SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS, PETITIONER,

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

No. 2897

THE STATE OF TEXAS,

v.

MARVIN CLEWES

INDICTMENT—Filed Sept. 12, 1962

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors, for the county of Midland, State aforesaid, duly organized as such at the September Term, A.D. 1962, of the District Court of the 142nd Judicial District for said County, upon their oaths in said Court present that MARVIN CLEWES, on or about the 21st day of January, A.D. 1962, and anterior to the presentment of this Indictment, in the County of Midland, and State of Texas, did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewes by choking her with a belt, and in some way or manner, and by some means, instruments and weapons, to the Grand Jurors unknown; against the peace and dignity of the State.

Frank Cowden, Jr., Foreman of the Grand Jury.

[fols. 5-14] THE STATE OF TEXAS

Endorsements: No. 2897

THE STATE OF TEXAS

vs.

MARVIN CLEWIS

INDICTMENT

Offense Murder.
William B. Smith Asst. Dist. Attorney.
A True Bill.
Frank Cowden, Jr. Foreman of Grand Jury.
Filed 12th Day of Sept. 1962.
Lucille Johnson District Clerk, By Ruby Murray Deputy.
Amount of Bail, $5000.00.

[fol. 15] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS, 142ND JUDICIAL DISTRICT, MIDLAND, TEXAS

[Title omitted]

MOTION TO REQUIRE STATE TO PRODUCE CONFESSIONS AND RULING THEREON—Filed May 14, 1964

To the Honorable Perry D. Pickett, Judge of Said Court:

Now Comes Marvin Clewis, defendant in the above entitled and numbered cause, and files this, his motion to require the State to produce for the inspection of his attorneys three written statements made by defendant relating to matters pertinent to the trial of this cause, and for such motion would show the Court the following:

I

The defendant, Marvin Clewis, stands charged with the crime of murder with malice aforethought, alleged to have occurred on the 21st day of January, 1962; that he was arrested without a warrant by Sgt. Jesus Morales of the Midland Police Department in the early morning hours of July 8, 1962, and he was interrogated by Midland police officers continuously for a period of two days. About 8:00 P.M. on July 9, 1962, he signed a statement in writing relating to matters material to disposition of the offense with which he stands charged; that this first statement was made as a result of interrogation by officers Morales, Gideon, and others, and by John Wood and Burl Reed of the Texas Department of Public Safety; that defendant's attorney has information to the effect that at a later date: that is, on or about July 12, 1962, at least one additional statement was taken by these officers and others; that still another [fol. 16] statement was taken by officers of the Midland County Sheriff's office at a later date, about July 16, 1962; that the defendant's attorney has reason to believe that there is material variance between the contents of these three or four statements:

1. That it is essential to a proper defense of this defendant that his attorney be furnished with accurate information as to the contents of the original statement made for

the reason that the officers taking such statement were the first persons to interrogate this defendant after he was taken into custody and each of such statements is material to establishing elements of defense in this case; that it is essential that defendant's attorney have knowledge of the facts disclosed by these statements because, among other defenses, the defendant in this case will contend that such statements reflect the use of force, coercion, threats and persuasion in their taking. These statements are material and important in preparation to show the state of defendant's will, and the circumstances existing at the time they were taken.

2. This defendant further alleges, on information and belief, that these statements made by this defendant contain exculpatory statements which may well constitute a defense to the acts charged in the indictment; that in all likelihood, the State will suppress such information and thereby deprive this defendant of evidence which he cannot otherwise produce.

II

This defendant urges the Court to force the State to produce the statements taken from this defendant on July 9, 1962, on July 12, 1962, and on or about July 16, 1962, for the reason that the statements or at least one of them will in all likelihood be relied upon by the State to seek a conviction of this defendant, and were drawn by the State and the signature of this defendant obtained thereon for the purpose of obtaining a conviction of this defendant; that the statements were not secured as a part of the investigation made in this case, nor were such statements necessary [fol. 17] for the purpose of filing the complaint or presenting the matters pertinent hereto to the grand jury for its action; but were obtained solely for the purpose of insuring a conviction of this defendant; that said statements are not true, and such statements omit exculpatory matter which was interspered with and constituted a part of such statements; that these statements should be produced and their contents made known to defendant's attorney so that he may more properly represent and defend him in the trial of this cause.

Wherefore, this defendant prays that the Court entertain this motion and hear defendant's evidence in connection herewith, and thereafter enter its order requiring the State to produce any or all of said statements for the inspection of defendant's attorney.

/s/ Reagan H. Legg, P.O. Box 107, Midland, Texas,
Attorney for Defendant.

Overruled: 9:40 A.M., Perry D. Pickett, Judge Presiding.

[fol. 18] [File endorsement omitted.]

[fol. 19] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

DEFENDANT'S MOTION TO EXCLUDE AND SUPPRESS STATE'S CONFESSIONS AND RULING THEREON—Filed May 14, 1964

To the Honorable Perry D. Pickett:

Now Comes the defendant Marvin Clewis and files this his motion to exclude the confessions obtained from him by the State, or for its benefit, and as grounds for such motion would show the Court as follows, to-wit:

I

That the defendant was arrested unlawfully and without a warrant by Jesus Morales, a police officer of the City of Midland, Texas, about 6:30 A.M. on July 8, 1962; that immediately subsequent to being taken into custody he was taken to the city police station where he was interrogated for two days without proper rest, sleep or food, and made a written statement which was secured through the efforts of officers Morales, Gideon, Kuykendall and others; that he was forced and persuaded to take certain polygraph tests and taken to the scene where the decomposed body of his wife had been discovered; that at all such times, all responsible officers of Midland County, Texas, and particularly the District Attorney of Midland County, Texas, as well as the Chief of Police of the City of Midland and the officers interrogating defendant and giving such tests knew that the defendant was without counsel and without funds to secure counsel independently, and that he was being interrogated about facts involving the killing of a person in Midland County, Texas; that the confession was obtained some time [fol. 20] late in the day on July 9, 1962, and he was thereafter taken before John H. Biggs, Justice of the Peace; that he was thereafter returned to the police station and subjected to continuous interrogation for another night and day; that he was thereafter transported to Borger, Texas, some 300 miles away, that he was again subjected to intensive interrogation and abuse by the officers; that there-

after, at a time when defendant's will had been overcome, these officers obtained another so-called "confession" in writing, giving a different version of the matter; that defendant was still without counsel and was illegally detained by city police officers; that the fear and exhaustion and other causes which produced the first two "confessions" were still present when yet a third "confession" was obtained by Sheriff's deputies Howell and Fletcher on or about July 16, 1962.

II

That during all of the time referred to above, from July 8th through July 16th, the defendant was without counsel though he was being interrogated about and was charged on the 9th day of July with the offense of murder with malice. That at all times pertinent hereto, the District Attorney had knowledge of fact that defendant was without counsel, and the taking of the final confession strongly indicates that the District Attorney's office feared a defense based on coercion, threats, persuasion or violence with reference to the first statements or confessions.

III

That under the facts and circumstances as above alleged, it was incumbent upon responsible authorities of Midland County, Texas, and particularly the District Attorney, to take steps as would be necessary to insure that adequate legal representation was afforded to Marvin Clewis during all police or other interrogation designed to procure evidence that could be used against Marvin Clewis in any subsequent prosecution based on the acts charged in the indictment in this case, or any other charge that might grow out of the facts surrounding the crime he is now called upon to defend.

[fol. 21]

IV

That during all of July 8th, 1962, and from that date through and including July 25, 1962, the defendant Marvin Clewis was without any character of legal representation in connection with this matter, as he could not employ an attorney of his own selection prior to that time and he was

not given advice by any lawyer licensed to practice in this or any other state, and he was not afforded the benefit of a court-appointed attorney during such period of time.

V

That under the laws of the United States and the case decisions of the Supreme Court of the United States, the defendant Marvin Clewis should have been represented by competent counsel from the period of his unlawful and first interrogation through his illegal detention, and particularly he should have been and laws compel the State to see that he was afforded adequate legal counsel during all period of interrogation by officers and his arraignment; that he was denied such counsel, and such denial amounts to and is and was a denial and violation of his constitutional rights.

VI

That the Sixth Amendment to the Constitution of the United States provides, among other things, that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

That the Fourteenth Amendment to the Constitution of the United States provides, among other things, as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That the right of Marvin Clewis to assistance of counsel as provided by the Sixth Amendment and his right to be afforded due process of law and the equal protection of the laws as provided by the Fourteenth Amendment, were denied and violated when a competent lawyer was not made available to advise him during the period or periods of his interrogation by the police officers of the City of Midland and any other officers that have interrogated him in con- [fol. 22] nection with the offense with which he stands

charged, and to have advised him at the time of his arraignment before the Justice of the Peace when he was required to plead to the offense and have his bond set. Proof of this latter fact is found in the fact that, when defendant did secure legal counsel, a habeas corpus proceeding was filed and the amount of his bond reduced from $10,000.00 as set by the Justice of the Peace on July 9, 1962, to $5,000.00, and he was then able to post bond and be freed. Had counsel been afforded him on July 9, 1962, at the time of arraignment, he could have posted bond and the last two confessions would not have been obtained by the officers by means of methods which violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, and he would not have been deprived of his liberty during such period.

VII

That contrary to the express provisions of the above quoted amendment to the Constitution of the United States, the defendant Marvin Clewis was forced to give evidence against himself by being subjected to long, protracted and continuous questioning while being held illegally in the police station for six days; that he was not fed properly nor allowed to rest; that he was refused permission to telephone his family or an attorney by the police; that he was threatened, persuaded, coerced, intimidated and abused; that the physical and psychological pressures and intimidations exerted on this defendant produced such a condition and set of conditions that none of the aforesaid confessions was the product of a rational intellect and a free will; that he was alone in the hands of the police in an atmosphere of coercion and inducement, and was not allowed to rest, and had reason to believe that the police had ample power to carry out their threats to continue his detention and the ordeal for a much longer period.

VIII

That this Honorable Court in the due administration of justice, and particularly in the discharge of its duty to see that Marvin Clewis is afforded a fair and impartial trial,

and that his constitutional rights are upheld, should ex- [fol. 23] clude as evidence, upon proper objection, the State's offer or tender in evidence of:

(1) The statement signed by Marvin Clewis on or about July 9, 1962, procured by officers Morales, Gideon, Wood, Reed, and others;

(2) The statement or statements signed by Marvin Clewis on or about July 12, 1962, procured by the above and other officers;

(3) The statement signed by Marvin Clewis on or about July 16, 1962, procured by officers Howell and Fletcher.

IX

The Supreme Court of the United States and other Federal Courts in many, many decisions have announced the rule that where a defendant's constitutional rights and privileges have been violated as above alleged, then as a method to prevent such future violations and as a means to enforce justice in the particular case before the court, such courts have excluded as inadmissible evidence obtained in violation of such defendant's rights; that the case before this Court presents a fact situation compelling the enforcement of such a rule for the reason that the evidence in this case will show, and this defendant now offers to prove, that from the time that this defendant was first apprehended in connection with the offense with which he stands charged in this Court, down to July 25, 1962, the State, through its officers, obtained confessions from the defendant in this case who could not pass his sixth grade work and whose indigent condition was well known to the officers and the District Attorney, and used means and methods which have repeatedly been condemned by the Supreme Court of the United States and the Texas Court of Criminal Appeals as violative of defendant's rights and as constituting coercion and physical and psychological abuse.

X

That the denial of the protection afforded by the Fifth and Fourteenth Amendments to the Constitution of the [fol. 24] United States as above alleged, to this defendant

in this particular case, works an unusual hardship and poses an imminent probability that injustice will be done in this case, because without these confessions or any of them, the State cannot produce evidence sufficient to sustain its indictment and charge against this defendant, or connect him in any way with this offense.

Wherefore, this defendant Marvin Clewis prays that the Court entertain this motion; that it hear evidence and argument in support hereof; and that it thereafter render judgment excluding and suppressing as evidence in this case the confessions above referred to, and any other confessions, if any, made during such period or any testimony relating to same.

/s/ Reagan H. Legg, P. O. Box 107, Midland, Texas,
Attorney for Defendant.

2 P.M.: Motion overruled.

Perry D. Pickett, Judge Presiding.

[fol. 25] [File endorsement omitted.]

[fo. 26] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

CHARGE OF THE COURT—Filed May 14, 1964

Gentlemen of the Jury:

The defendant, Marvin Clewis, stands charged by indictment with the offense of murder, it being alleged in the indictment that on or about the 21st day of January, 1962, in Midland County, Texas, the said Marvin Clewis, did voluntarily and with malice aforethought kill Dorothy Mae Clewis by choking her with a belt, and in some way or manner, and by some means, instruments or weapons to the Grand Jury unknown.

The defendant has pleaded "not guilty".

In arriving at your verdict you will be guided by the following charge, which you will consider as a whole.

1

Whoever shall voluntarily kill any person within this State shall be guilty of murder.

2

Murder is distinguisable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

3

Murder, as above defined, may be committed either with or without malice aforethought. When murder is committed with malice aforethought, the punishment for such murder shall be by death or confinement in the penitentiary for life or confinement in the penitentiary for any term of not less [fol. 27] than two years. When murder is committed but not upon malice aforethought, the punishment for such murder is confinement in the penitentiary for not less than two nor more than five years.

4

"Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion, with the purpose, means and ability to accomplish the reasonable and probable consequence of the act. Malice aforethought includes all those states of mind under which the killing of a person takes place without any cause which will in law justify or excuse the homicide: it is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. Malice in its legal sense denotes a wrongful act done intentionally, without just cause. If malice be fully conceived and formed, no definite period of time is necessary to intervene between the formed design to kill and the homicide.

5

The term "voluntary" means done of one's own free will and accord, without the interference of another, with the intent to accomplish the reasonable and probable consequences of the act done.

6

You are instructed that the term "on or before the 21st day of January, 1962", as used in the indictment in this cause means at any time prior to the return of the indictment in this cause on the 12th day of September, 1962.

7

Bearing in mind the foregoing instructions and definitions, you are instructed that if you should find and believe from the evidence beyond a reasonable doubt that the defendant, Marvin Clewis, in the County of Midland and State of Texas, on or about the 21st day of January, 1962, the time alleged [fol. 28] in the indictment, did unlawfully, voluntarily, and with his malice aforethought kill Dorothy Mae Clewis by then and there choking the said Dorothy Mae Clewis with a belt or in some way or manner, and by some means, instruments, or weapons, to the Grand Jury unknown, then you will find the defendant guilty of murder with malice and fix his punishment at death, or by confinement in the

penitentiary for life, or by confinement in the penitentiary for any term of years not less than two, but if you do not so believe, or if you have a reasonable doubt thereof, then you will acquit the defendant of murder with malice.

8

You are further instructed that if you do find and believe beyond a reasonable doubt that the defendant, under the instructions given you in this charge and under the facts in evidence, was guilty of murder, but you should have a reasonable doubt as to whether or not the defendant, in committing the offense, if he did, was prompted and acted with his malice aforethought, then you should resolve this doubt in favor of the defendant; and in such case the punishment assessed by you for said offense, if any, could not be for a longer term than five years in the penitentiary.

9

Murder without malice aforethought is a voluntary homicide committed without justification or excuse under the immediate influence of sudden passion arising from an adequate cause, by which is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in the mind of a person of ordinary temper sufficient to render the mind incapable of cool reflection.

[fol. 29] To reduce a voluntary homicide to the grade of murder without malice, it is necessary, not only that the condition existed which would have rendered the mind of a person of ordinary temper incapable of cool reflection, but also that such condition, if any, did, at the time of the homicide, render the mind of the person committing the homicide, incapable of cool reflection.

10

You are further instructed that if you shall find and believe, or you have a reasonable doubt thereof, from all the facts and circumstances in evidence, both those occurring at or about the time of the homicide, or prior thereto, that the mind of the defendant, Marvin Clewis, was in such condition of sudden passion arising from an adequate cause, as that term has hereinbefore been defined to you, as to

render it incapable of cool reflection, and that such cause, or causes, if any, was such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection and that, while in such condition of mind, the defendant committed the offense charged in the indictment, then you cannot assess a penalty of more than five years in the penitentiary.

11

Now, therefore, if you should find and believe from the evidence beyond a reasonable doubt that the defendant, Marvin Clewis, in the County of Midland, and State of Texas, did on or about the 21st day of January, 1962, unlawfully and voluntarily kill the deceased, Dorothy Mae Clewis, by choking her with a belt, or in some way or manner and by some means, instruments and weapons to the Grand Jury unknown, but you further find and believe, [fol. 30] or have a reasonable donbt thereof, that from all the facts and circumstances in evidence in this case, the defendant in killing the deceased, if he did, was not prompted and did not act with his malice aforethought, as the same is defined to you in this charge, then you will find the defendant guilty of murder without malice and assess his punishment at confinement in the penitentiary for any term of years not less than two nor more than five years.

12

You are further charged that unless you believe from the evidence beyond a reasonable doubt that at the time of the alleged assault, if any, the defendant then and there had the *specific intent* to take the life of the said Dorothy Mae Clewis, or if you have a reasonable doubt thereof, you will find the defendant not guilty of the offense of murder.

13

Unless you find the defendant guilty from the evidence in this case, beyond a reasonable doubt, of murder with malice aforethought, or of murder without malice, as hereinbefore defined, then you must acquit him of murder, and next consider whether or not the defendant is guilty of an aggravated assault and battery.

14

The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention coupled with an ability to commit a battery is an assault.

[fol. 31] By the expression "coupled with an ability to commit a battery" is meant that the person making an assault must at the time be in such position and in such distance of the person so assaulted that, if not prevented, he may inflict a battery upon such person by the use of the means with which he attempts it.

An assault or battery becomes aggravated when it is committed by an adult male upon the person of a female under circumstances not amounting to an intention to murder or maim, or when serious bodily injury is inflicted on the person assaulted. An adult male is a male person at least 21 years of age.

The punishment for an aggravated assault is by fine of not less than $25.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month nor more than two years or by both such fine and imprisonment.

15

Now you are charged that if you find and believe from the evidence beyond a reasonable doubt that the defendant, Marvin Clewis, at the time and place alleged in the indictment, did then and there make an assault and battery upon Dorothy Mae Clewis under circumstances not amounting to an intent to murder or maim, and that the said Marvin Clewis was then and there an adult male as that term is herein defined, and that Dorothy Mae Clewis was then and there a woman, then and in the event you so find and believe, you will find the defendant guilty of aggravated assault and battery and assess his punishment at a fine of not less than $25.00 nor more than $1,000.00, or by confinement in the County Jail for not less than one month nor more than two years, or by both such fine and imprisonment.

However, you are further charged, if you do not so find

or if you have a reasonable doubt thereof, you will acquit the defendant of aggravated assault and battery.

[fol. 32] 16

You are further instructed that under the law, if a defendant is charged by indictment with the homicide of a specifically named person, the State must prove beyond a reasonable doubt that the deceased person, whose body or portions thereof were found, is in fact the same person named in the indictment, and no other; and the defendant cannot be convicted of the alleged homicide unless the evidence proves beyond a reasonable doubt that the alleged decedent named in the indictment, and the person whose death is shown by the evidence, is one and the same person.

Therefore, if you find and believe that the person whose remains were found north of Midland was not Dorothy Mae Clewis, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

[fol. 33] 17

You are instructed that a confession of a defendant, in order to be admissible in evidence against him, must be in writing and signed by said defendant and shown by the evidence to have been freely and voluntarily made, without compulsion or persuasion.

So, in this case, if you believe from the evidence that the confession introduced in evidence by the State was not freely and voluntarily made, or if you believe the same was induced by duress, threats, coercion, fear, fraud, violence or fear of violence to his person, lack of food, lack of sleep, persuasion, cursing, or other improper influence, or if you have a reasonable doubt thereof, then you will wholly disregard such confession and consider it for no purpose whatever, and draw no inference nor conclusions therefrom, and you will acquit the defendant unless you believe from the other evidence in this case, if any, beyond a reasonable doubt, that the defendant's guilt has been established of the offense charged in the indictment.

You are further instructed, however, that if you believe from the evidence, that the defendant, prior to signing the statement, if he did, which has been introduced in evidence

by the State, had made another or different statement or statements from that which has been introduced by the State, and if you further believe or have a reasonable doubt thereof that he was induced by duress, violence or fear of violence to his person, threats, cursing, or persuasion, on the part of the officers to make such prior statement or statements, if he did; or that such prior statement or statements, if any, was induced by prolonged and persistent questioning, if any, on the part of the officers, without sufficient food, drink or opportunity for rest and sleep; [fol. 34] or that an officer told him that he would be questioned continually unless he did give a confession, or that an officer told him that he would be beaten if he did not give a statement;—or that such prior statement or statements, if any, was induced by any other improper influence, if any;—and if you believe from the evidence that either of such earlier statements, if any, was produced by duress, threats, coercion, fear, fraud, violence, lack of food, lack of sleep, persuasion, or other improper influence, or if you have a reasonable doubt thereof, then the "voluntary statement" in evidence before you is presumed to have been produced by the same influences, and the State has the burden of overcoming such presumption and doubt that at the time the written statement before you was taken, the defendant was not in a state of apprehension or fear that duress, threats, coercion, fear, fraud, violence or fear of violence to his person, lack of food, lack of sleep, cursing, persuasion or other improper influence would be used upon him. Therefore, if you believe from the evidence, or if you have a reasonable doubt thereof that the defendant at the time of making the written statement before your was apprehensive or fearful that duress, threats, coercion, fear, fraud, violence or fear of violence to his person, lack of food, lack of sleep, cursing, persuasion or other improper influence, if any, would be used in attempting to secure a statement from him, then such statement is not under law considered to have been freely and voluntarily made, and you will wholly disregard such statement and consider it for no purpose whatever and draw no inference nor conclusions therefrom.

[fol. 35] 18

No person can be convicted upon his confession unless it is corroborated by other evidence, and whether there is other evidence is for the jury to determine and you are so instructed.

19

A confession, standing alone, is not sufficient for a finding of guilt, but same must be corroborated by other evidence. Corroborate means to strengthen or add weight to a thing, and requires proof, direct or circumstantial which leads an impartial and reasonable mind to believe the matter to be corroborated is true. Corroboration of the confession means in effect proof of the corpus delicti. The corpus delicti in this connection means:

(1) That the body of the deceased, or portions of it has been found and sufficiently identified to establish the fact of the death of the person alleged to have been killed;

(2) That the deceased was killed and that the kiling was caused by the criminal agency of some one;

and unless the corpus delicti is proved in all of these respects, a confession by an accused is not by itself sufficient to sustain a conviction. Where the corpus delicti is established independent of the confession, then a defendant's identity as the criminal agency which caused the death may rest alone upon his confession. The law requires that the corroborating evidence be such, as when taken in connection with the confession, will persuade the jury of the guilt of accused beyond a reasonable doubt.

Therefore, bearing the foregoing instructions in mind, you are instructed that before a conviction can be had in this case, you must believe beyond a reasonable doubt that the body of the alleged deceased, or portions of it, has been found and sufficiently identified to establish the fact of the [fol. 36] death of Dorothy Mac Clewis, that she was killed and her death was caused by the criminal agency of someone, and the foregoing propositions must have been established beyond a reasonable doubt independent of the alleged written statement of the defendant; and you must further find beyond a reasonable doubt that the defendant

herein and none other killed her as charged in the indictment; and unless you believe from the evidence beyond a reasonable doubt that the body of Dorothy Mae Clewis, or portions of it have been found and sufficiently identified to establish the fact of her death, that the death of Dorothy Mae Clewis was caused by the defendant, Marvin Clewis, and none other, by choking her with a belt or in some way or manner, or by some means, instruments or weapons to the Grand Jury unknown, you will acquit him, and these questions it is your province to determine from all the facts and circumstances which are in evidence before you. And in this connection you are instructed that you can not convict the defendant on his confession alone, if any, and unless you believe from the evidence beyond a reasonable doubt that there are such extrinsic corroborating facts and circumstances in evidence as will, taken in connection with the confession, if any, produce conviction in your mind of the defendant's guilt, you will acquit him.

[fol. 37] 20

Evidence has been introduced that the defendant was subjected to so-called "polygraph tests". You are instructed that under the law any purported results or conclusions resulting from such so-called tests may not be introduced in evidence by either the State or the defendant, and are not considered competent evidence for any purpose.

[fol. 38] 21

Among other defenses set up by the defendant is what is known as an alibi; that is, that if the offense was committed, as alleged, that the defendant was, at the time of the commission thereof, at another and different place from that at which such offense was committed, and therefore was not and could not have been the person who committed the same; now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed (if committed), at the time of the commission thereof, you will find him not guilty.

22

The defendant in this case has filed an affidavit among other things stating that he has never been convicted of a felony in this or in any other state. Our stautes provide that where a person is charged with murder, and the jury finds him guilty and assesses the punishment at imprisonment in the penitentiary for a term of not more than five years, and they further find that the defendant has never been convicted of a felony in this or in any other state, the jury may cause the sentence to be suspended during the good behavior of the defendant, which matter of whether you do or do not recommend a suspension of the defendant's sentence is one that rests within the sound discretion of the jury.

Now, if you find the defendant guilty of murder as charged in the indictment and assess his punishment at five years or less, you will further consider and determine whether he has ever before been convicted of a felony in this or any other state, and if you find that he has never before been convicted of a felony in this or any other state, and if you further determine that you recommend the suspension of his sentence, you will so state in your verdict. [fol. 39] You are instructed that filing of an application for a suspended sentence is no evidence of the defendant's guilt, and you are, therefore, charged not to consider the filing of such application for a suspended sentence by the defendant in this case as any evidence of the defendant's guilt or innocence.

[fol. 40]

23

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him.

24

The burden of proof in all criminal cases rests upon the State throughout the trial and never shifts to the defendant.

25

You are further charged that an indictment is no evidence of guilt.

26

You are further instructed that in arriving at your verdict you must not resort to any system of averages or any casting of lots or any chance, but your verdict must be the result of your deliberate judgment from the testimony before you, and the law of the case as herein given to you.

27

You are limited in your deliberations upon a verdict to the consideration and discussion of such facts and circumstances only as were admitted in evidence, or as are reasonable deducible from the evidence; and you can not legally and must not consider nor discuss any fact or circumstance not thus in evidence or reasonably deducible from the evidence. Nor may a juror relate to any of the others any fact or circumstance of which he may have or claim to have knowledge or information, that was not introduced in evidence, and neither may any of the jurors lawfully discuss anything else, so far as the evidence is concerned, other than the evidence introduced by the parties and admitted by the Court.

[fol. 41]

28

You are charged that you are the exclusive judges of the facts proven, of the credibility of the witnesses and of the weight to be given their testimony but the law of the case you must receive from the Court as laid down in these instructions, and be governed thereby.

29

After argument of counsel, you will retire to the jury room, select your own foreman and proceed with your deliberations.

30

If the jury wishes to communicate with the Court they shall so notify the sheriff, who shall inform the Court thereof; and they may be brought before the Court, and through their foreman shall state to the Court in writing, what they desire to communicate.

31

Forms of verdict are herewith submitted which you may use.

32

The verdict must be unanimous.

Perry D. Pickett, Judge Presiding.

Any communication with the Court must be in writing and signed by your Foreman.

[fol. 42] [File endorsement omitted.]

[fol. 43] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

VERDICT—May 17, 1964

We, the Jury, find the defendant, Marvin Clewis, guilty of the offense of murder with malice, as charged in the indictment, and assess his punishment at confinement in the State penitentiary for a term of Twenty Five (25) years.

Raymond M. Evdaily, Foreman.

[File endorsement omitted.]

[fol. 44] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

STATE OF TEXAS,

VS.

MARVIN CLEWIS

JUDGMENT—May 18, 1964

On the 11th day of May, 1964, this cause was called for trial, and the state appeared by her district attorney and the defendant Marvin Clewis appeared in person, in open court, his counsel also being present, and the said defendant Marvin Clewis having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury, to wit, Raymond M. Eudaily and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of the verdict, and afterward were brought into court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to wit:

"No. 2897

IN THE 142ND JUDICIAL DISTRICT COURT OF MIDLAND COUNTY, TEXAS

THE STATE OF TEXAS,

VS.

MARVIN CLEWIS

We, the Jury, find the defendant, Marvin Clewis, guilty of the offense of murder with malice, as charged in the indictment, and assess his punishment at confinement in

the State penitentiary for a term of Twenty Five (25) years.

Raymond M. Eudaily, Foreman."

It is therefore considered and adjudged by the court that the defendant Marvin Clewis is guilty of murder with malice aforethought as found by the jury, and that he be punished as has been determined by the jury, that is by confinement in the State penitentiary for twenty-five years, and that he be remanded to jail to await the further order of this court herein.

Perry D. Pickett, Judge Presiding.

[File endorsement omitted.]

[fol. 45] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

DEFENDANT'S ORIGINAL MOTION FOR NEW TRIAL—Filed May 25, 1964

To the Honorable Perry D. Pickett, Judge of Said Court:

Comes Now Marvin Clewis, defendant in the above entitled and numbered cause, and moves the Court to set aside the verdict herein rendered against him on the 17th day of May, 1964, and grant him a new trial for and upon the following grounds and reasons, to-wit:

I

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In permitting the State to introduce a written statement, denominated State's Exhibit No. 13 herein, purportedly signed by this defendant when in truth and in fact such statement was not a voluntary statement and was not made by this defendant at a time when his will was not overborne as is required by the decisions of the Supreme Court of the United States. In the making of such statement, this defendant was denied the protection of the Fourteenth Amendment to the Constitution of the United States, specifically the due process clause thereof. The evidence in this case produced in connection with defendant's motion to exclude confessions definitely establishes that the statements made by this defendant, and particularly State's Exhibit No. 13 herein, was not the product of a rational intellect and a free will.

II

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In [fol. 46] overruling the defendant's motion to require State to produce confessions for the reason that the examination and inspection of such confessions and statements were material and important in preparing the defense in this case to show the state of defendant's will and the circumstances existing at the time they were taken. The produc-

tion of such statements was further material and important to the defense of this case for the reason that they contained exculpatory statements which would have constituted a defense to the acts charged in the indictment, and which were suppressed by the State, depriving this defendant of evidence which he could not otherwise produce.

III

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion to exclude and suppress Sate's confessions filed herein, when the evidence produced in support of such motion showed that such statements were taken in violation of the Fourteenth Amendment of the Constitution of the United States in that he was not fed properly, he was not allowed to rest, he was subjected to long, protracted and continuous questioning while being held illegally by the Police, and he was alone in the hands of the Police in an atmosphere of coercion and inducement.

IV

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: The uncontradicted evidence shows that defendant was without counsel at all times prior to the making of the statements which defendant sought to exclude and suppress; that he was particularly without counsel at the time he was taken before a justice of the peace at Midland County, Texas, and waived his examining trial and bond was set. The right to assistance of counsel was a right guaranteed to defendant by the Fourteenth Amendment to the Constitution of the United States, and the hearing held before a justice of the [fol. 47] peace of Midland County, Texas, was a critical stage under the law of the State of Texas, and this defendant should have been represented by counsel at such time. Thereafter, two additional statements purportedly signed by this defendant were taken in an atmosphere of coercion, which would not have occurred had counsel been appointed for this defendant as required by the Constitution.

V

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion for instructed verdict at the close of State's evidence and again at the close of all of the evidence, because there was no other testimony which corroborated the written statement or confession introduced by the State as Exhibit No. 13 during the trial.

VI

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In refusing to instruct the jury upon the law of circumstantial evidence as requested by this defendant in defendant's special requested charge No. 2.

VII

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In refusing to require the jury to make a specific finding as to the voluntariness or lack thereof of the confession introduced herein as State's Exhibit No. 13. Had there been such a specific finding, there is no question but that under the law and the evidence in this case defendant would have been entitled to an instruction on the law of circumstantial evidence.

VIII

Because the said verdict is contrary to the law and the evidence, in this, to-wit: There was no testimony which showed any malice on the part of this defendant as that [fol. 48] term is defined by law, and under the law and the evidence herein, the most severe penalty which could have been assessed against this defendant was that of five years confinement in the State Penitentiary.

IX

Because the said verdict is contrary to the law and the evidence, in this, to-wit: Under the instructions of this Court, the uncontradicted evidence herein showed that this

defendant had been coerced into signing the statements taken by State, and without such statement, there is no evidence which would permit the jury to find this defendant guilty of the offense of murder with malice aforethought.

Wherefore, premises considered, defendant prays that the Court grant this defendant a new trial and set aside the verdict and judgment herein rendered against him.

/s/ Marvin Clewis, Defendant.

Duly sworn to by Marvin Clewis. Jurat omitted in printing.

[fols. 49-52] [File endorsement omitted.]

[fol. 53] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

DEFENDANT'S FIRST AMENDED MOTION FOR NEW TRIAL—Filed July 17, 1964

To the Honorable Perry D. Pickett, Judge of Said Court:

Comes Now Marvin Clewis, defendant in the above entitled and numbered cause, and moves the Court to set aside the verdict herein rendered against him on the 17th day of May, 1964, and grant him a new trial for and upon the following grounds and reasons, to-wit:

I

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In permitting the State to introduce a written statement, denominated State's Exhibit No. 13 herein, purportedly signed by this defendant when in truth and in fact such statement was not a voluntary statement and was not made by this defendant at a time when his will was not overborne as is required by the decisions of the Supreme Court of the United States. In the making of such statement, this defendant was denied the protection of the Fourteenth Amendment to the Constitution of the United States, specifically the due process clause thereof. The evidence in this case produced in connection with defendant's motion to exclude confessions definitely establishes that the statements made by this defendant, and particularly State's Exhibit No. 13 herein, was not the product of a rational intellect and a free will.

II

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In [fol. 54] permitting the State to introduce a written statement denominated State's Exhibit No. 13 herein purportedly signed by this defendant when the evidence showed that such statement was the third of a series of written statements taken by the State from this defendant while he was in custody and when the uncontradicted evidence

showed that at least the first two of such statements were taken at a time when this defendant did not have sufficient food or sleep to be capable of voluntarily making a statement or a confession, and that the same circumstances which induced him to make the first two confessions induced him to make the confession which was introduced into evidence as State's Exhibit No. 13. This confession was, therefore, procured under circumstances condemned by the decisions of the Supreme Court of the United States, and was not the product of a rational intellect and a free will.

III

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling the defendant's motion to require State to produce confessions for the reason that the examination and inspection of such confessions and statements were material and important in preparing the defense in this case to show the state of defendant's will and the circumstances existing at the time they were taken. The production of such statements was further material and important to the defense of this case for the reason that they contained exculpatory statements which would have constituted a defense to the acts charged in the indictment, and which were suppressed by the State, depriving this defendant of evidence which he could not otherwise produce.

IV

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In failing to require the State to introduce all confessions procured by the State from this defendant for the reason [fol. 55] that all of such confessions demonstrated the chain of events and coercion and circumstances amounting to coercion practiced upon this defendant by the officers in securing such confessions. Without all such confessions being introduced in evidence by the State or being made available to this defendant for introduction in evidence, it was impossible for this defendant to adequately demonstrate the circumstances of and acts of coercion which were practiced upon him, depriving him of his rights under the

Constitution of the United States, the evidence having showed the existence of such prior confessions, but not their content.

V

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion to exclude and suppress State's confessions filed herein, when the evidence produced in support of such motion showed that such statements were taken in violation of the Fourteenth Amendment to the Constitution of the United States in that he was not fed properly, he was not allowed to rest, he was subjected to long, protracted and continuous questioning while being held illegally by the Police, and he was alone in the hands of the Police in an atmosphere of coercion and inducement.

IV

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion to exclude and suppress all confessions secured by the State from this defendant for the reason that the uncontradicted evidence showed that the arrest of this defendant was an illegal arrest without a warrant and that his detention thereafter was illegal and that there existed a causal connection between the failure of the officers to secure a warrant for his arrest and the securing of the subsequent confessions from this defendant.

VII

[fol. 56] Because the Court committed a material error calculated to injure the rights of this defendent, in this, to-wit: The uncontradicted evidence shows that defendant was without counsel at all times prior to the making of the statements which defendant sought to exclude and suppress; that he was particularly without counsel at the time he was taken before a justice of the peace of Midland County, Texas, and waived his examining trial and bond was set. The right to assistance of counsel was a right guaranteed to defendant by the Fourteenth Amendment to the Constitution of the United States, and the hearing held before a justice of the peace of Midland County, Texas, was a critical stage under

the law of the State of Texas, and this defendant should have been represented by counsel at such time. Thereafter, two additional statements purportedly signed by this defendant were taken in an atmosphere of coercion, which would not have occurred had counsel been appointed for this defendant as required by the Constitution.

VIII

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion for instructed verdict at the close of State's evidence and again at the close of all of the evidence, because there was no other testimony which corroborated the written statement or confession introduced by the State as Exhibit No. 13 during the trial.

IX

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion for instructed verdict at the close of State's evidence and again at the close of all the evidence, because the evidence showed that the written statement or confession introduced by the State as Exhibit No. 13 was [fol. 57] procured under circumstances amounting to coercion as defined by the decisions of the Supreme Court of the United States.

X

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion for instructed verdict at the close of the State's evidence and again at the close of all the evidence, because the uncontradicted evidence showed that this defendant was not afforded the right to counsel as guaranteed by the Constitution of the United States.

XI

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In overruling defendant's motion for instructed verdict at the close of State's evidence and again at the close of all the evidence, for the reason that there was insufficient evidence

introduced by the State that the deceased, Dorothy Mae Clewis, met her death by criminal means and the corpus delicti was therefore not established by the State as required by law.

XII

Because the Court committed a material error calulated to injure the rights of this defendant, in this, to-wit: In refusing to instruct the jury upon the law of circumstantial evidence as requested by this defendant in defendant's special requested charge No. 2, which special requested charge as submitted reads as follows:

"You are instructed that all of the evidence shown which the State relies upon for a conviction in this case, except for the alleged 'voluntary statement' which has been submitted to you, is circumstantial evidence. Therefore, if you have answered 'Yes' to the preceding question pertaining to whether or not such statement was made and given freely and voluntarily, as that term has been defined to you, then you will be bound by the instructions contained in the following two paragraphs:

In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the con- [fol. 58] clusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged.

But in such cases, it is not sufficient that the circumstances coincide with, account for, and therefore render probable, the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis, except the defendant's guilt, and unless they do so, beyond a reasonable doubt, you will acquit the defendant and find him 'Not Guilty'."

XIII

Because the Court committed a material error calculated to injure the rights of this defendant, in this, to-wit: In refusing to require the jury to make a specific finding as to the voluntariness or lack thereof of the confession introduced herein as State's Exhibit No. 13. Had there been such a specific finding, there is no question but that under the law and the evidence in this case defendant would have been entitled to an instruction on the law of circumstantial evidence.

XIV

Because the said verdict is contrary to the law and the evidence, in this, to-wit: There was no testimony which showed any malice on the part of this defendant as that term is defined by law, and under the law and the evidence herein, the most severe penalty which could have been assessed against this defendant was that of five years confinement in the State Penitentiary. There being no evidence of malice aforethought, the Court erred in instructing the jury on the law of murder with malice aforethought and in permitting the jury to return a verdict relating to the offense of murder with malice aforethought.

XV

Because said verdict is contrary to the law and the evidence in this, to-wit: The verdict of the jury finding that this [fol. 59] defendant was guilty of the offense of murder with malice aforethought is not supported by the evidence, there being no evidence apart from the confession introduced as State's Exhibit No. 13 which would permit the jury to find the defendant guilty of the offense of murder with malice aforethought.

XVI

Because the verdict of the jury is contrary to the law and the evidence, in this, to-wit: There is insufficient evidence to support any finding by the jury that Dorothy Mae Clewis was dead or that, if she was, she met her death by crinimal means. Without such finding, this defendant cannot be adjudged guilty of the offense of murder with malice aforethought.

Wherefore, premises considered, defendant prays that the Court grant him a new trial and set aside the verdict and judgment herein rendered against him.

/s/ Marvin Clewis, Defendant.

Duly sworn to by Marvin Clewis jurat omitted in printing.

[fols. 60-61] [File endorsement omitted.]

[fol. 62] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

SENTENCE—July 27, 1964

This day this cause being again called, the state appeared by her district attorney, and the defendant Marvin Clewis was brought into open court in person in charge of the sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term, his counsel also being present. And thereupon the defendant Marvin Clewis was asked by the court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the court proceeded, in the presence of the said defendant Marvin Clewis, to pronounce sentence against him as follows: It is the order of the court that the defendant Marvin Clewis, who has been adjudged to be guilty of murder with malice aforethought and whose punishment has been asessed by the verdict of the jury at confinement for twenty-five years in the penitentiary, be delivered by the sheriff of Midland County, Texas, immediately to the superintendent of the penitentiaries of the state of Texas, or other person legally authorized to receive such convicts, and the said Marvin Clewis shall be confined in said penitentiaries for a period of time not less than two years and not more than twenty-five years in accordance with the provisions of the law governing the penitentiaries of said state. And the said Marvin Clewis is remanded to jail until said sheriff can obey the directions of this sentence.

/s/ Perry D. Pickett, Judge Presiding.

[fol. 63] [File endorsement omitted.]

[fol. 64] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—July 27, 1964

This day came on to be heard the motion of the defendant, Marvin Clewis, to set aside the verdict, and judgment herein rendered on the 18th day of May, 1964, and grant him a new trial of this cause; and the State being present in Court by her District Attorney, and the defendant, Marvin Clewis, being present in Court in person with his attorney, Reagan Legg, and the Court having heard the said motion, and the evidence thereon submitted, is of the opinion that the same should be refused. It is therefore considered, ordered, and adjudged by the Court that the said motion for a new trial herein be and the same is refused, and in all things overruled. Whereupon the defendant, Marvin Clewis, in open Court, excepted to such judgment and gave notice of an appeal herein to the Court of Criminal Appeals of the State of Texas, which said notice is herenow entered of record.

/s/ Perry D. Pickett, Judge Presiding, 142nd Judicial District, Midland County, Texas.

[File endorsement omitted.]

[fol. 65] Clerks Certificate to foregoing Papers Omitted in Printing.

[fol. a] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

March Term, A. D. 1964

Cause No. 2897

THE STATE OF TEXAS, Plaintiff,

vs.

MARVIN CLEWIS, Defendant

Statement of Facts

APPEARANCES:

Hon. Perry D. Pickett, District Judge, 142nd Judicial District, Presiding.

Hon. Wm. B. Smith, Hon. James A. Mashburn, Assistant District Attorneys for the State of Texas, Plaintiff.

Hon. Reagan L. Legg, Midland, Texas, for the Defendant Marvin Clewis.

[fols. b-11] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

March Term, A. D. 1964

No. 2897

THE STATE OF TEXAS, Plaintiff,

vs.

MARVIN CLEWIS, Defendant

CAPTION

Be It Remembered That, on the 11th day of May, A. D. 1964, same being one of the days of the regular March, 1964, term of the District Court of Midland County, Texas, came on to be heard the above styled and numbered cause, and a jury being selected, impaneled, and sworn, the following proceedings were had, to-wit:

* * * * * * *

[fol. 12] GUY FLETCHER, a witness for the Plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Will you state your name, please, sir?
A. Guy Fletcher.
Q. And what is your employment, please, Mr. Fletcher?
A. Deputy Sheriff.
Q. Here in Midland County?
A. Yes, sir.

* * * * * * *

[fols. 13-16] Q. All right, sir. Now, Mr. Fletcher, I call your attention back to July 5, 1962, and I ask you, sir, did you have occasion to be out in the country northwest of the City of Midland?
A. Yes, sir.

Q. And will you tell the jury, please, why you were out in that area of the country, sir?

A. Yes. I was in the office just a little before twelve o'clock on that day, and someone called in from the Whiz Grocery and said there were two Latin American boys there that thought they had found a body out northwest of town.

* * * * * * *

[fol. 17] Q. What did you do then?

A. We went back to this Whiz store and called the Justice of the Peace and some more officers to come out.

Q. Then what did you do, please?

A. Well, after Judge Biggs got there and some more officers, why, they dug the skeleton up.

Q. Beg your pardon. After Judge Biggs and other officers got there, what did you do?

A. Finished digging the skeleton up.

Q. All right, sir. Now, were you participating in digging up the skeleton?

A. Not except the first time I went there, the digging up to find out that it was someone, some person.

Q. Were you there observing and were you present as the skeleton was being dug up?

A. Yes, sir.

Q. Tell the jury, please, what you observed about the [fol. 18] skeleton, if anything.

A. Well, when I went to digging it up, actually a lot of it came apart. The head came off and some of the bones just fell apart.

Q. About how deep was the skeleton in the ground, please?

A. Well, I would say it varied from a foot to a foot and a half and maybe in some places almost two feet.

Q. When you first arrived out there before—arrived with the Latin Americans, did I understand you correctly to say the face was or was not covered with sand?

A. It was covered up.

Q. All right. Did you notice any articles of clothing or otherwise concerning the skeleton?

A. Yes, it had something across this part of her legs (indicating) that looked like a brassiere, a black brassiere.

Q. All right, what happened to that object?

A. We brought it in.

Q. I will ask you to examine what has been marked State's Exhibit 2.

A. Yes, sir, that is it.

Q. Is State's Exhibit 2 the brassiere you are talking about?

A. Yes, sir.

Q. You found on the body.

[fol. 19] A. Yes, sir. There is my initial right there.

Q. Was there any other article of clothing or not, anything to do with the skeleton?

A. I don't believe there was any more clothing.

Q. Was there anything?

A. Yes.

Q. What?

A. There was a belt around the neck.

Q. Will you describe how the belt was around the neck?

A. Well, it looked like an ordinary belt, probably the size of a dress belt—it wasn't this wide (demonstrating measurement with his hands), it was a narrow belt—pulled through the buckle.

Q. How big was the circle that the belt going through the buckle—how big was the circle that was left?

A. It was pretty small; I would say it was fairly small.

Q. I show you what has been marked State's Exhibit 3 and will ask you if you can identify it, sir.

A. Yes. That's my initials right there. (Refers to some writing on a tag attached to the article.)

Q. What is it, please, sir?

A. It is a belt.

Q. Is this the same belt you were testifying about?

A. Yes, sir.

[fols. 20-32] Q. It came from around the neck of the skeleton?

A. Yes, sir.

Q. Now, was the belt, as you took it from the skeleton or observed it being taken from the skeleton, in this same stiff condition or was it otherwise, or how do you describe it?

A. No, sir, it was moist at that time around the neck and wasn't stiff like that. It has dried out, it looks like, since we got it in here.

Q. Now, sir, I believe you testified that Exhibit 1, the plat, substantially represents the area as you saw it that day, July 5, 1962. Is that right?

A. Yes, sir.

* * * * * * *

[fol. 33] Cross examination.

By Mr. Legg:

Q. All right. Now were there any other officers that you remember? Anybody from the City Police Department out there any time you were these?

A. I remember seeing this Mexican officer there, this Latin American that works over there, shortly after we got there.

Q. What is his name?

A. I believe it is Morales.

Q. Morales?

A. He is a detective over there. I believe his name is Morales.

Q. All right. Now, let me ask you this—of course, that was outside the city limits, wasn't it, Guy?

A. Yes.

Q. And, of course, the Sheriff's office normally has jurisdiction outside the city limits and the Police Department doesn't. Isn't that correct?

A. Yes, sir, that's correct.

Q. Did you at any time request the assistance of any of policemen, or anything like that, in the investigation of the case?

A. No, sir.

Q. Did your office or anybody in it, to your knowledge, ever request the assistance of the police?

[fol. 34] A. Not to my knowledge.

Q. All right. Your office, of course, is accustomed to conducting investigations of this nature, and you do so, do you not?

A. Yes, sir.

Q. All right. Now, Guy, I believe you said that there—was there enough left of the—you referred to it as a skeleton that you found out there—where you could tell anything about the features or anything like that of the person?

A. No, sir.

Q. Could you identify it as black or white?

A. No, sir.

Q. You could not tell at all what the color of the skin of that person may have been when he or she was alive?

A. No, sir, no way in the world.

Q. Could you tell anything about the sex, or anything like that, of the person?

A. No, sir.

Q. From what you saw there.

A. No, sir.

Q. Now, did you have any idea who it was?

A. At that time, no sir.

Q. You say you found a belt out there—I think that has [fol. 35] been introduced here. It looks kind of like a belt.

A. Yes, sir.

Q. I don't know whether it was a belt or halter. And you say, then, that this was somewhere around the area of the neck.

A. It was around the neck.

Q. Of course, you just had bones left there, didn't you?

A. Well, in the neck there was quite a bit of moisture. There wasn't any flesh, but it is probably what is inside of your neck bone. There was more moisture there than anywhere else.

Q. More moisture there.

A. I believe so.

Q. And you did investigate this. Guy, let me ask you this: From your investigation, did you as an officer of some twenty-nine or thirty years' experience form any opinion as to how this person met his or her death, or anything about it?

A. Well, it certainly would have been an opinion if I had formed one. I mean, I had no way of knowing.

Q. You had no way of knowing.

A. No, sir.

Q. Now, of course, the fact that you found a brassiere around the knees, and I believe you said the knees were in [fol. 36] this sort of a position (demonstrating)——

A. The brassiere was about here (indicating).

Q. The brassiere was about here. (Indicates on his body.)

A. Yes, sir.

Q. Let me ask you this, Guy. From what you saw out there and from your experience as an officer and from what you have done, is it or is it not possible or probable that under these circumstances that brassiere had been tied

around the legs and maybe the belt tied around the upper part of the body for the purpose of carrying that body somewhere.

A. It is certainly possible.

Q. So there is no way of really knowing from what you saw out there, based upon your experience as an officer, to determine how this person may have died or what might have caused death?

A. No, sir, no way in the world.

Q. When you went back out there with Mr. Schumann, and what we have established may have been some time in January of this year, that is the only time you went out there with him?

A. Yes.

Q. All right. When you went out there with Mr. Schumann and looked at the hole again when he ran his elevations and all this business, did the hole look then just about [fol. 37] like it did when you were out there on July 5, 1962?

A. No, sir, there was some change in it.

Q. What kind of change?

A. It looked like it had been dug in, and then there was sand——

Q. Looked like it had been dug in.

A. Yes, since we were there the last time.

Q. And then there was sand in it.

A. Yes.

Q. Did you ever do any digging out there?

A. Not a whole lot. We did dig——

Q. I mean after that.

A. After Schumann was out there?

Q. No, after the bones, let's say, were picked up by the Ellis Funeral Home and delivered to——

A. I was alone when there was some digging done, yes.

Q. Did they dig pretty deep down in there, or what?

A. Not very deep, no, sir.

Q. Well, now you think, though, that since that digging was done, after this had been found out there and after you had been out the first time and during the investigation, the hole when you went out there the last time showed some evidence of additional digging?

A. Yes, sir.

[fol. 38] Q. Now I believe you told Mr. Smith, Guy, that

you were present when Dr. Madsen looked at this skeleton and bones, and so forth.

A. She was working on them, yes, at the undertaker's.

Q. Well, of course, you were the officer, the principal officer, in charge of the investigation, weren't you?

A. Yes, sir.

Q. Now did Dr. Madsen at that time express to you any opinion about how long ago the death had occurred to this particular person or skeleton?

Mr. Smith: May it please the Court, that is hearsay.

Mr. Legg: No, your Honor, I don't think it would be hearsay. She is listed as a witness for the State, and Mr. Fletcher is on the stand. He is chief investigating officer. This is a very vital and material issue in the defense of Marvin Clewis. We ask that he be permitted to answer that question.

The Court: All right.

Q. Would you tell us then, Mr. Fletcher, what opinion was expressed by Dr. Madsen?

A. I believe she, at that time, said about three months.

Q. All right, did she say something like six weeks to three months?

[fol. 39] A. I believe that's right.

Q. Now, of course, this was in July.

A. Yes.

Q. Was it the same day you went out there?

A. Same day.

Q. July 5, 1962.

A. Yes.

Q. And the opinion that she expressed to you was that this body had—that the death probably had occurred from six weeks to three months previously.

A. I believe that's about right, Mr. Legg.

* * * * * * *

Redirect examination.

By Mr. Smith:

Q. Mr. Fletcher, the skeleton that you saw there in the grave, did it have teeth in it?

A. Yes.

Q. As Chief Deputy with the Midland Sheriff's Department, did anyone report Dorothy Mae Clewis as being missing?

A. Yes.

Q. Who is that that reported his missing?

A. Her mother.

Q. Did Marvin Clewis ever report her as missing?

[fol. 40] A. No, sir.

Q. To the Sheriff's Department?

A. Not that I know of. I don't think he did.

* * * * * * *

E. H. KIRKSEY, a witness for the State, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.

A. E. H. Kirksey.

Q. And what is your employment, please, Mr. Kirksey?

A. Deputy Sheriff of Midland County.

Q. And how long have you been a deputy sheriff of Midland County?

A. About ten years.

Q. Where do you live, please, Mr. Kirksey?

A. Midland, 4303 Brookdale.

Q. Are you married, sir?

A. Yes, sir.

[fol. 41] Q. Have children?

A. Two.

Q. Outside of your experience as a deputy sheriff in Mid-

land County, what other experience, if any, have you had as a peace officer, sir?

A. I was Deputy Sheriff in Dawson County and also Hudspeth County, and I was in the Custom Control.

Q. And how long have you been in Midland, please? The ten years you mentioned?

A. Yes, sir.

Q. Mr. Kirksey, did you have occasion to be northwest of the City of Midland on July 5, 1962?

A. Yes, sir, I did.

Q. And I show you, sir, what has been marked State's Exhibit 1. Take a look at it. You can step down, if you like. You have seen State's Exhibit 1 before, have you not?

A. Yes, sir, I have.

Q. And would you point out to the jury, please, sir, the area where you went northwest of town on July 5, 1962. If I may be of some help, this (indicating on Exhibit 1) is Midland Drive and this is Midkiff.

A. It was right off of Farm Road 868 northwest of town.

Q. All right. Does this area right here, which is north of Farm Road 868, substantially represent where you went?

[fol. 42] A. Yes, sir, it does. (The witness takes his seat in witness chair.)

Q. What did you observe out there, Mr. Kirksey?

A. Oh, a shallow grave with the body in it, the remains of a body.

Q. Would you describe what you saw there in the grave?

A. When I first arrived I saw the face of a skull and one knee sticking out of the sand.

Q. Had Mr. Fletcher arrived before you or not?

A. Yes, sir, he had.

Q. He was already there?

A. Yes, sir.

Q. All right, sir, and you saw the face and one knee. What else did you observe then, please, or what else did you do?

A. Well, we proceeded to dig up the remains.

Q. All right, sir, and did you assist in the digging yourself?

A. Yes, sir, I did.

Q. What else did you have to do with the skeleton there?

A. As we dug it out, we placed it on a sheet there that the funeral home had brought out.

Q. Did you remove some portions of the skeleton yourself?

[fol. 43] A. Yes, sir.

Q. What portions, please?

A. Well, the head and various parts of the upper part of the body. I was digging at the head, where the head was.

Q. Did you notice any type of clothing or articles in connection with the skeleton?

A. Yes, sir.

Q. Would you tell the jury what you observed about that, please?

A. It was a belt and a brassiere.

Q. Where were they, please, if you recall?

A. The belt was around the skeleton's neck, and the brassiere was around between the knees and the hips.

Q. Would you describe, please, how you observed the belt was? Describe the condition of the belt or how it was.

A. Well, I was digging on this front end and I saw the end of the belt, and the head was kind of loose on the skeleton so we dug this from around the neck of the skeleton.

Q. Do you recall whether it was through the buckle or otherwise?

A. It was through the buckle.

Q. Do you have any idea how big the circle was, if you recall?

A. Well, it wasn't very big. I would say it was probably [fol. 44] about four inches.

Q. Mr. Kirksey, I show you what has been marked State's Exhibit 3, and ask you, please, if you can identify it.

A. Yes, sir, that is the belt that was around the neck.

Q. And I show you State's Exhibit 2 and ask you if you can identify it.

A. Yes, sir, that is the brassiere that was on the body.

Q. All right, same brassiere and same belt which you have just finished testifying about?

A. Yes, sir.

Q. Now, then, what did you do with these bones as you would remove them from the grave, sir?

A. Placed them on a sheet.

Q. And what happened to the bones then, if you know?

A. Well, they were carried to Newnie Ellis Funeral Home.

Q. All right, sir. What would you say as to the condition of the belt as compared now with when it was removed from the skeleton itself as to stiffness, or otherwise, or dryness, or otherwise?

A. It is dried up dry, and it is not through the buckle like it was.

Q. I see. Did you put the skull along with the other bones on that sheet you were talking about?

A. Yes, sir.

[fol. 45] Q. Did you see the skull any more?

A. Yes, sir, I did.

Q. Did you notice anything about the skull so that you could or could not identify it as you saw it from time to time?

A. I think I could identify it, yes, sir, by the gold in the teeth.

Q. All right, sir, did you have occasion to see the skull any more after you put it on the sheet?

A. Yes, sir.

Q. And where was it, please, sir, that you saw it?

A. Dr. Hughston's office.

Q. Did you also see it at the funeral home?

A. Oh, yes, I saw it at the funeral home.

Q. All right, did you see it anywhere else?

A. Dr. Hughston's office, here in Midland.

Q. Anywhere else, sir?

A. Yes, sir.

Q. Sir?

A. Yes, sir, I saw it.

Q. Where else have you see it, sir? Did you have occasion to take it anywhere?

A. Carried it to Waco to Dr. Radford.

Q. Doctor who?

[fol. 46] A. Radford.

Q. Dr. Radford? In Waco?

A. Yes.

Q. Is he a dentist down there?

A. Yes, sir.

Q. All right, sir. When you were at Dr. Hughston's office, when the skull was there, what did you observe in relation to the skull and what was being done there? What did you observe?

A. Well, he was making a cast of the teeth.

Q. You observed Dr. Hughston doing this, working on the teeth, making the mold?

A. We carried the head there to get the mold, and when I went back he had it made and I carried some paint out there and he painted—I saw him paint gold and stuff on the teeth.

Q. Was this the same head, now, that you took out of the grave?

A. Yes, sir.

Q. Mr. Kirksey, I show you what has been marked State's Exhibit 9, a box, and ask you to examine the contents of it and see if you can identify State's Exhibit 9.

Mr. Legg: I don't know what is in that box, your Honor, but I would ask that it not be demonstrated to the jury [fol. 47] until such time as it is offered in evidence.

The Court: All right.

Mr. Legg: And ask that the witness be instructed to examine it but not in the presence of the jury.

Mr. Smith: Well, where shall we have him examine it?

Mr. Legg: Well, I mean where they can't see it. I don't know what it is.

Mr. Smith: Oh, I see. Well, shall I block the view of the jury and let the witness look at it?

Mr. Legg: That is all right.

(Mr. Smith stands between the jury and the witness in order that the witness may examine the contents of the box in his hands out of the sight of the jurors.)

Q. Would you examine what are the contents of Exhibit 9, please, sir?

Mr. Legg: Can you let me look? (Mr. Legg goes to the witness chair.)

Q. Can you identify State's Exhibit 9?

A. (Witness looking into the box) Yes, sir, I can.

Q. What is it, please?

A. It is a cast of the teeth that Dr. Hughston made of that skull.

[fol. 48] Q. All right, sir. Same mold you saw him making?

A. Yes, sir.

Q. The same skull. That right?

A. Yes, sir.

Q. Do you have any manner of identifying it, State's Exhibit 9?

A. Well, I have my initials on it.

Q. All right, sir, does it also appear to be the same teeth and gold, et cetera?

A. Yes, it is.

Q. All right, sir. When you went to Waco, did you or did you not have this mold of the teeth, State's Exhibit 9, with you, sir?

A. Yes, sir, I did.

Q. And did you or did you not have the skull that you had taken from the grave with you?

A. I did.

Q. And what did you do with the skull and with the mold when you got to Waco?

A. I carried it to Dr. Radford's office for an examination.

Q. Did you show both of them to Dr. Radford?

A. Yes, sir, I did.

Q. Was that in July of 1962, or when was that—in July [fol. 49] 1962?

A. Yes, sir, it was.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. How long was it you got out there—I guess Guy called you, didn't he?

A. Yes, he called on the radio.

Q. And how long after that did you get out to this place you told Mr. Smith about?

A. Oh, probably about ten minutes.

Q. All right, you said you helped start the digging. How much digging had been done when you got there?

A. The face was uncovered. Guy told me he had uncovered the face of the skull.

Q. Can you tell us about how deep the hole was out there at that time?

A. Oh, I would say it was probably two feet.

Q. It was uncovered when you first got there?

A. The face of the skull was uncovered.

Q. All right. Now was the rest of it level with the ground? I mean, how much of a depression before you started digging? Excuse me, I am not making sense. How deep was [fol. 50] the depression in the ground where you could see the skull and—could you see anything else?

A. One knee sticking up.

Q. One knee?

A. Yes, sir.

Q. The rest of it, though was covered——

A. Yes, sir.

Q. —with dirt. Is that right?

A. Yes, sir.

Q. Was there any way of telling what color the skin of that person had been or anything like that?

A. No, sir.

Q. Of course, you didn't know what kind of bones that was until you—until you saw the skull, you wouldn't know.

A. No, sir. The skull was out when I got there, the face of it.

Q. The face of it.

A. The face of it. You could tell it was a human.

Q. Was there any way you could tell how deep the hole had been originally?

A. No, sir. It was soft sand and you couldn't tell. It was probably, I would say, two feet.

Q. Soft sand. In other words, it was the kind of sand that blows, and so forth, wasn't it?

[fol. 51] A. It could blow; it was on the side of a hill.

Q. He has up here "Blow sand ridge" and that really was what that was, wasn't it?

A. It was more or less a sand dune.

Q. Yes. I mean, the kind that builds up when the wind blows. Now you have lived in this country a long time.

A. Yes, sir.

Q. And that is basically true, isn't it?

A. Yes, sir.

Q. Kirksey, you have been in law enforcement work about how long?

A. Twenty years.

Q. Twenty years. You have investigated a good many cases, have you not?

A. Quite a few.

Q. This is not the first skeleton you ever saw during your law enforcement work?

A. No, sir.

Q. Now let me ask you this. Based on your experience and from what you saw out there that day, was there any way at all that you could form an opinion as to the cause of death of this skeleton that you saw or the identity of it or anything of that nature?

A. Well, the only thing you could form an opinion on [fol. 52] was that belt around its neck.

Q. All right, there was something else around the legs, wasn't there? That right?

A. Yes, sir.

Q. A brassiere.

A. Yes, sir.

Q. Let me ask you this: Based again upon your experience, and so forth, could that have been used, the belt and the brassiere and so forth, to carry that body just as easily as it could have been used as any kind of instrument to cause the death of the person?

A. It could have been used to carry it.

Q. Yes, sir.

A. And you could have carried it with the belt, the way it was around its neck, drug it or carried it.

Q. All right. Now, of course, there wasn't any evidence of anything having been drug across there at that late date, was there?

A. No, sir.

Q. I believe you said that there was no way that you could identify the sex or the color of the skin or anything else of the remains that you found. That right?

A. No, sir, there wasn't.

Q. Now I believe you said you carried this box, the con- [fol. 53] tents of the box at least what you examined here, to Waco to a Dr. Radford.

Q. Yes, sir.

Q. Who is he?

A. A dentist in Waco.

Q. What kind of dentist? Do you know?

A. No, sir.

Q. Is he a white man or a colored man, or what?

A. Colored.

Q. How many times did you take this to Waco?

A. Twice, I believe.

Q. Twice. When was the first time?

A. Oh, about the middle of July, 1962.

Q. When was the second time?

A. About three months ago, I believe.

Q. What was the purpose of you taking this to Dr. Radford?

A. To see if he could identify it as being his work.

Q. Now you took not only this but you took the real McCoy,——

A. Yes, sir.

Q. —the teeth themselves, on both occasions.

A. Yes, sir.

Q. You have identified this as a thing you saw made in [fol. 54] Dr. Hughston's office out here. How do you know that is the same one?

A. I was there when it was painted and I put my initials, scratched my initials on the back of it.

Q. You are satisfied this is the one that you saw painted in Dr. Hughston's office.

A. Yes, sir, I know it is.

Q. Do you remember what day of the week it was when Guy called you and you went out there and found this?

A. I believe it was on Thursday.

Q. Thursday?

A. Thursday or Friday. It was July 5th.

Q. July 5th. You don't remember the day of the week?

A. It was Thursday or Friday.

Q. Now then, did you participate in the investigation of the case thereafter?

A. Very little.

Q. Very little?

A. Yes, sir.

Q. Let me ask you this: Did you talk to Marvin Clewis on Saturday night after that?

A. Yes, sir, I did.

Q. And where did you talk to Marvin Clewis?

A. In the Sheriff's office.

[fol. 55] Q. And about what time of the day or night was that?

A. It was about 11:30 at night.

Q. Could it have been midnight or thereabouts?

A. It was about 11 or 11:30.

Q. It could have been 12, couldn't it? No, no, do you know the exact time? If you do, fine, and if you don't, why, then, all right.

A. No, sir. It was around 11:30.

Q. Were you on duty at that time?

A. No, sir.

Q. Had you gone home?

A. Yes, sir.

Q. Were you in bed?

A. No, sir, I wasn't in bed.

Q. All right. Now, how did you happen to come to the Sheriff's office?

A. They called us in the office and said Marvin Clewis was down there and wanted to know if I wanted to come down and talk to him.

Q. All right, did Marvin come in voluntarily or had somebody brought him up there?

A. He was there when I got there. I suppose he came in.

Q. Voluntarily?

A. Yes, sir.

[fol. 56] Q. You had known where he was, did you?

A. Pardon?

Q. You knew where he was prior to that time, didn't you?

A. Well, I had heard that he was working up at Borger.

Q. Up in Borger, all right. Now, when he came in that night, did you show him this thing here that you just exhibited?

A. No, sir.

Q. Did you show him the skull?

A. No, sir.

Q. Did you show him anything about the teeth?

A. No, sir.

Q. Did you question him there for some time?

A. Yes, sir.

Q. About how long?

A. Probably an hour or an hour and a half.

Q. All right. Now then did you put him in jail?

A. No, sir.

Q. Well, tell us what happened.

A. Well, he—I let him go home. He was to come back at eight o'clock the next morning,——

Q. All right,——

A. —Sunday morning.

Q. —did he come back?

[fol. 57] A. Yes, sir.

Q. To the Sheriff's office?

A. Yes, sir.

Q. Now was any member of the Midland Police Department or any other officer other than those in the sheriff's office present down there when you were interrogating Marvin Clewis?

A. No, sir.

Q. And did he then leave?

A. He did.

Q. By himself or did you take him somewhere?

A. He left by himself.

Q. At that time did you ask him if he had anything to do with the death of his wife?

Mr. Smith: We would object, your Honor, on the ground that this would be hearsay and would tend to bring out some type of self-serving declarations at this time, and is inadmissible under the law.

The Court: Sustained.

Mr. Legg: Note our exceptions for the reason that this is a part of the investigation. Mr. Kirksey is here on the stand testifying, and we believe that we are entitled under the law to elicit any information from him. He was not held in custody thereafter; therefore, whatever conversation he had with him is very material to the issues in this case.

[fol. 58] Q. Was he going to come down here and talk to you the next morning, did you tell him, at eight o'clock?

A. No, sir.

Q. Did he come at eight o'clock the next morning?

A. No, sir.

Q. Do you know why?

A. He was in jail, over in the city jail.

Q. All right, did you find that out later?

A. Yes, sir.

Q. Did anybody say anything to you from the City Police Department about going to get him or question him, or anything like that?

A. No, sir.

Mr. Legg: I believe that is all, your Honor.

Redirect examination

By Mr. Smith:

Q. Mr. Kirksey, when you removed the head from the grave, did you put it on the sheet or in the custody of the Ellis Funeral Home people in the same condition you took it out of the grave, or did you change it some way?

A. Didn't change it. I might have scraped some dirt off of it to examine it.

[fol. 59] Q. All right, I see. Is it possible, sir, or not, that there could have been some mumified skin on the skull?

A. It had a little bit of skin on it.

Q. Now this time you were talking about here with counsel about 11:30 at night, when the defendant was talking with you—I am talking about that time, now,— had you not left word at where he was staying for him to come to the Sheriff's Department if and when he arrived in town?

A. Yes, sir, I had.

Mr. Smith: The State will introduce State's Exhibit 9 at this time, and pass the witness.

Mr. Legg: Your Honor, we have no objection to the admission in evidence for the purpose as shown by Mr. Kirksey, that that is a cast of some teeth, that that is the article that he took to Waco, and so forth. We do object to its admissibility as being a cast of the teeth involved in the testimony thus far. We do not believe that has been proved or established, because Mr. Kirksey did not make the cast and the dentist has not been produced before the jury.

The Court: The Court will permit it to be introduced for limited purpose.

Mr. Smith: The limited purpose is that the mold is of

the teeth from the head that Mr. Kirksey took out of the grave. Is that right? I didn't quite understand you.

[fols. 60-65] Mr. Legg: No, that it is the mold of the teeth that he took to Waco and what he testified to.

The Court: Just like he testified; for the limited purpose of what Mr. Kirksey testified to.

Mr. Smith: I thought we had brought out that he had said in his earlier testimony that this was the same head that he saw in Dr. Hughston's office and he saw Dr. Hughston making this mold from the same head that he took out of the grave, and it was this same mold and this same head that he took to Waco. It was on that basis that we were introducing this as it was completely tied in with this gentleman's testimony as to the teeth he took out of the grave, so that is why we introduce it as being the mold of the teeth that came from the grave.

The Court: All right.

A photograph of the mold of the teeth herein testified about is attached to this record and identified as *State's Exhibit 9*.

Mr. Smith: That is all.

Mr. Legg: That is all.

* * * * * * *

[fol. 66] G. H. Radford, a witness called by the State, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.

A. G. H. Radford.

Q. Were you sworn this morning? Did you take the oath this morning?

A. I did.

Q. All right, Dr. Radford. Are you married, sir?

A. I am.

Q. You have children?

A. I have three children.

Q. All right, and where do you live?

A. Waco, Texas.

Q. And what is your employment or business?

A. I am a dentist.

Q. And would you tell us your background and education to prepare you for dentistry, please, sir?

A. Well, I graduated from Terrell High School in Fort [fol. 67] Worth; I graduated from the Wylie College in Marshall, Texas; I graduated from Harry Medical College in Nashville, Tennessee.

Q. All right, do you have a license to practice dentistry in Texas, sir?

A. I have.

Q. And how long have you been practicing dentistry in Texas?

A. I finished in 1929, which means I have been practicing thirty-five years.

Q. Are you on any community organizations there in Waco?

A. Yes.

Q. Will you name them?

A. I was appointed by the City Council on the Building and Standing Commission. I am also a member of the Board of Trustees of the United Fund, Waco.

Q. All right, sir. I am going to show you what has been marked State's Exhibit 9 and ask you to examine it, please, sir. Exhibit 9 is a box and the contents thereof. Examine State's Exhibit 9, please. Can you identify State's Exhibit 9?

A. Yes.

Q. All right.

A. I took out two teeth for Dorothy Charles.

[fol. 68] Q. For Dorothy Charles?

A. Yes.

Q. All right.

A. She had three that needed taking out, but I couldn't persuade her to take out but two of them. She was already wearing a bridge here on her left side.

Q. Would you mind stepping down from the witness chair and pointing out what you are talking about so the jury can see better, please. Just point and show what you are talking about, please, sir?

A. (The witness turns toward the Court as he testifies.)

She was wearing this bridge, with a crown here, a crown here. This (indicating) is a dummy. I took these two teeth out here, and I made this crown and this little dummy here and put these two teeth in here. In making these dummies here, now I always put gold across the edge. If you will notice, right across the edge here there is a little more gold, and when I first started practicing I was always having these teeth to break, so I always put a little strip of gold across the edge here to keep it from breaking. One reason I can easily identify this is that I always make my little lugs here flat. I was taught at school to make them round, but the tooth surface itself is flat so I always make my dummies, like this, flat, and anyone who has ever seen [fol. 69] any of my work could very easily identify it, because actually it is supposed to be more round but I make mine flat. Now,——

Q. Before you go further, will you step down and show this jury what you have just showed the Court?

A. All right. (Steps down from the witness chair and goes over to the jury rail.) You see, this (indicating) is flat. This strip of gold here is flat, and right across the edge here I have a little gold there. It is just a little more than this that is shown here, and, as I said, I always make the gold to go just above those white teeth. These here are white teeth where I slip on that little slot there.

Q. What was that about the round and the flat? I didn't quite——

A. This (indicating) is supposed to be round, this little piece of gold here. It is supposed to be round, but I always make my lugs here flat. Because the middle of the tooth is flat, I just make that flat.

Q. All right, you were reaching in your pocket. What was that?

A. This (taking an object from his pocket) is what we call a steel backing. This is steel facing. Now this fits on here like that, but now when I make mine I take that backing, put a little strip of gold across it, and I have more protection. Like that (indicating). Now this is one that [fol. 70] has been finished, and you will notice when I put that crown on there I have quite a bit of gold exposed across the edge of this tooth here. It is made like that so—you can see that that gold is across the edge. That keeps any

pressure from off this white tooth and keeps it from breaking. Now what I was saying—I didn't make this one—that little lug is kind of round. Now here is the one that I made. You can see it is almost identical with that one there, you see, because it is flat, whereas this one is round, and sometimes—I have taken them out where other people have made them completely round. It is just a little piece that is just completely round, but you will notice that this one is more oval shape than mine which is completely flat. Now here is one that is completely round, you see. Now I didn't make that one. That was some that I took out.

Q. You may get back on the witness stand. (The witness takes his seat in the witness chair.) Dr. Radford, I ask you, sir, is there any doubt that this model, State's Exhibit 9, is your work?

Mr. Legg: Your Honor, I object to that question. He can ask him what his opinion is.

The Court: Sustained.

Q. In your opinion, Doctor, is this State's Exhibit 9, the model, in your opinion, is that your work, sir?

[fol. 71] A. That is my work.

Q. And, in your opinion, could it be the teeth of anyone other than Mrs. Dorothy Mae Charles that you mentioned?

A. No.

Q. Would you know Dorothy Mae Charles if you were to see her again?

A. Sure, yes.

Q. I show you, sir, what has been marked State's Exhibit 10 and ask you, sir, if you can identify it. (Hands photograph to the witness.)

A. Yes, sir, that is her picture, but she was a little lighter than is on this picture.

Q. I see. This picture you are talking about the light of white folks——

A. No, sir.

Q. —but of colored folks.

A. That's right.

Q. That is Dorothy Mae Charles?

A. That is Dorothy Mae Charles.

Q. Is that the same Dorothy Mae Charles you have been testifying about?

A. That is the same one.

Q. Is that the same Dorothy Mae Charles who you made the impression of the teeth of in Exhibit 9?

[fol. 72] A. Yes.

Q. When did you do this work, Dr. Radford?

A. It was either in '51 or '52. I think it was '52.

Q. All right, sir, and where did you do this?

A. In Waco, Texas.

Q. In your practice as a dentist, sir, in this type of work a routine sort of thing or otherwise or different or normal or unusual?

A. No, this is unusual, in that when you make a bridge you always try to get the patient to let you make the full bridge instead of adding to this bridge. As a matter of fact, very few times you are able to match the gold and the next place, in this case, you are not sure about the condition under this other tooth. I was unable to persuade her to make the complete bridge. She was in a hurry, and I had to go ahead and fix it like this.

Mr. Smith: That is all.

Cross-examination

By Mr. Legg:

Q. Dr. Radford, how many patients would you say that you see in the course of a year?

A. How was that now?

Q. How many patients do you see in the course of a year, how many different people as patients?

[fol. 73] A. I average about fifteen a day.

Q. About fifteen a day.

A. Or seventy-five a week.

Q. So you see about four or five thousand patients a year.

A. That is right.

Q. You got a pretty big practice.

A. Yes.

Q. How many times did you ever see Dorothy Mae Charles?

A. Three times.

Q. Three times, and that was in connection with this same——

A. —same bridge, yes.

Q. Were they all close together?

A. Yes.

Q. What dates were they? Do you remember?

A. Yes, possibly four days in all.

Q. And do you remember what those dates were?

A. What dates?

Q. Yes.

A. Well, I took those teeth out on a Monday, now. I don't remember the exact date of the month, if that's what you mean, but I took them out on a Monday and put it back in Thursday.

[fol. 74] Q. Do you remember the year? I mean the month or the year?

A. No, I don't remember exactly the month or the year.

Q. All right, Doctor, how do you know these are Dorothy Mae Charles' teeth——

A. Because——

Q. —and the style of the work here?

A. That is something I don't do very often is make teeth, as I said, adding to another bridge she already had.

Q. You don't do that very often?

A. No.

Q. Not in the course of seeing three or four thousand patients?

A. I haven't done that more'n four or five times since I've been practicing.

Q. Why was it necessary to do this this way this time?

A. Well, it was a matter of finances and a matter of time.

Q. It is cheaper to do it this way?

A. Yes, it is.

Q. Of course, some of your other patients have trouble with their front teeth, and so forth, and they have problems of finances, too, don't they?

A. Yes, they do.

[fol. 75] Q. But you never done this more than four or five times.

A. That's right.

Q. Of course, other dentists have done it, haven't they?

A. About that I wouldn't know, but it's not routine.

Q. It's not routine?

A. No. In other words, she has three different kinds of gold in her mouth right there.

Q. Three different kinds of what?

A. Gold, in color.

Q. How you tell that?

A. This and this, this and this is different, and this——

Q. How can you tell that?

A. Well, I saw the skull.

Q. You saw the skull?

A. Yeah.

Q. All right, and you did two of them and didn't do the other. Is that right?

A. That's right.

Q. That's the reason for the different kinds of gold?

A. No, somebody else—in other words, she has three different types of dental work in her mouth. Three different dentists did work in her mouth.

Q. Now you knew that, of course, when you saw the skull.

A. Yes, that's what I said.

[fol. 76] Q. Now, of course, you keep records in your office, don't you?

A. Yes.

Q. Do you have records in your possession, with you, that show Dorothy Mae Charles and her chart and what you did to her teeth, and so forth?

A. No.

Q. Why don't you have those records?

A. They were destroyed in a tornado.

Q. Sir?

A. They were destroyed in a tornado. A tornado tore up my office.

Q. They were destroyed in a tornado?

A. Uh huh.

Q. All of your records?

A. All my records.

Q. That was about 1952?

A. '53.

Q. 1953, and you say you did this work about 1952?

A. Yes.

Q. Without any records in your office, and purely from recollection, you identify the picture here of a woman you never saw but about three times and saw ten years ago then.

A. Yes.

[fol. 77] Q. As being the person that you did this work for.

A. That's right.

Q. Well, Doctor, how can you be so certain of that?

A. I told you that it was a very unusual case. You remember cases that you have trouble with better than you can routine cases.

Q. And you had trouble with this one?

A. Oh, yes.

Q. Well, tell me about that.

A. You see, here's what happened. You see, this tooth here was decayed.

Q. Ten years ago it was decayed.

A. It decayed ten years ago, and I told her it wouldn't last more than five years because it was going to decay under there. It was decayed so badly that I couldn't remove all of the decay. You see, all I could do was to sterilize that. If I would remove the decay I would hit the nerve. I could sterilize it to where it would give no trouble, but it is going to continue to decay, and that was——

Q. And it evidently did.

A. Yes.

Q. For ten years after you told her that.

A. I don't know how soon afterwards, but it is decayed now.

[fol. 78] Q. Well, you know it was decayed in 1952 because you told her that in the last five years.

A. That's right, that's right.

Q. Is that right?

A. That's right.

Q. But ten years later, why, there she is. Is that right?

A. That's right.

Q. And that tooth had some gold around it.

A. This is the gold I put in there.

Q. Oh, you put the gold in there.

A. Yes, sir. You see, in other words, this tooth should have been taken out.

Q. I see.

A. And she wouldn't allow me to take it out.

Q. But the decay was still then when you——

A. I removed as much decay as I possibly could.

Q. I thought you said—oh, she wouldn't let you take it out, but she did let you work on it.

A. That's right, that's right

Q. And it decayed again, evidently. That right?

A. Yes, it did.

Q. Now, Doctor, how, ordinarily, do you keep records on your patients?

[fol. 79] A. Why, I have a chart that I make out with all of that on there, a card.

Q. Does the teeth show on there and you mark them——

A. Yes.

Q. —and you show on there what you did to them and all that?

A. Uh huh.

Q. And you lost all of those records?

A. Yes. During the tornado my office was destroyed.

Q. How many times have you talked to Mr. Smith here, Doctor?

A. Oh, possibly three times.

Q. Three times?

A. Uh huh.

Q. Is that all?

A. Uh huh.

Q. And that was all in Waco?

A. Yes.

Q. He came down there to Waco three times to talk to you about your testimony in this case. Is that right?

A. Well, now,——

Q. Was it more than that?

A. No, it wasn't more than that. It might have been two times. I know he came twice. I am not sure about the [fol. 80] third time, but I think it was.

Q. You think Mr. Smith took a trip from Midland to Waco on three occasions to talk to you about your testimony in this case?

A. Well, yes, the first time he brought the skull.

Q. Oh, Mr. Smith came with the deputy sheriff and brought the skull?

A. That's right.

Q. And talked to you then about it. That right?

A. Yes.

Q. And he came down still later?

A. Yes, he came after the trial was postponed.
Q. All right, and then you think he came another time.
A. Well, he might. I think so, yes.
Q. When did you come out here, Doctor, this time?
A. I came out here Wednesday.
Q. Wednesday?
A. Yes. Yesterday.
Q. Yesterday?
A. Uh huh.

Mr. Legg: Thank you, Doctor. That is all.

* * * * * * *

[fols. 81-88] Mrs. James F. Burford, a witness for the State, after first being duly sworn, testified as follows:

Direct examination

* * * * * * *

[fol. 89] Jurors Resume Their Seats

The Court: Mr. Smith?

Q. (By Mr. Smith) Mrs. Burford, I show you again what [fol. 90] has been marked State's Exhibit 10 and ask you if that is Dorothy Mae Clewis as you knew her.
A. Yes, it is.

Mr. Smith: Again we introduce State's Exhibit 10.

Q. What were Dorothy Mae's duties, Mrs. Burford, when she was employed by you, please?
A. General housekeeping, washing, ironing, baby sitting, if needed, and things like that.
Q. She would baby sit for you?
A. Yes.
Q. Would you leave the house and leave the children in her care?
A. Yes.
Q. Is that what you mean by baby sitting?
A. Yes.
Q. And what were her days, please, ma'am?

A. Monday through Friday from about nine until about two or three.

Q. Nine a.m. until about two or three in the afternoon?

A. Yes, sir.

Q. And when did you last see her alive, please?

A. January 19, 1962.

Q. And at what time?

A. Between two and three, I believe.

[fol. 91] Q. I show you what has been marked State's Exhibit 11. Would you examine it, please, ma'am? Can you identify it?

A. That is a check I wrote on Friday and paid her for the week.

Q. Was that written on the day the check is dated?

A. Yes.

Q. And that is what, please, ma'am?

A. January 19th.

Q. 1962?

A. Yes.

Q. You paid Dorothy Mae Clewis on that date?

A. Yes.

Q. That was on Friday, you say.

A. Yes.

Q. This check is written out in your hand completely. Is that right?

A. Yes.

Q. And you gave it to Dorothy Mae Clewis.

A. Yes.

Q. When was she supposed to come back to work for you, please, ma'am?

A. The following Monday.

Q. That would be about the 22nd. That right?

A. Yes.

[fol. 92] Q. Did she report for work?

A. No.

Q. I believe you said this was the last time you saw her when you paid her the check.

A. Yes.

Q. Would you tell the jury, please, whether or not she was in good health at this time.

A. Yes, she was.

Q. January 19, '62.

A. As far as memory goes, she was in good health and was expected back.

Mr. Smith: If the Court please, the State would introduce in evidence State's Exhibit 11.

Mr. Legg: We have no objection to that.

A photocopy of *State's Exhibit 11* is attached to this record, same being a check dated January 19, 1962, on The First National Bank of Midland, Texas, in the amount of $15.00, payable to the order of Dorothy M. Clewis, signed by Mrs. J. F. Burford, endorsed Dorothy Mae Clewis, and paid by The First National Bank of Midland, on January 22, 1962.

[fol. 93] Q. Mrs. Burford, does State's Exhibit 10, the picture, substantially look like Dorothy Mae Clewis——

A. Yes, it does.

Q. —the last time you saw her on January 19, 1962?

A. Yes.

Mr. Smith: We pass the witness.

Cross-examination.

By Mr. Legg:

Q. Mrs. Burford, I believe you testified that Mrs. Clewis worked for you for about four years as your maid. Is that right?

A. Yes.

Q. And during that period of time—I assume she was pretty good help?

A. She was very good help.

Q. Now during that period of time—well, let me ask you this way: You say she didn't return to work, then, on Monday?

A. No.

Q. Did you think anything about it in particular?

A. I thought probably she had gone out of town and was delayed in coming back. She had done it before.

Q. She had done it before.

A. She had gone fishing and the car would break down, [fol. 94] or something.

Q. All right, and so this was not an uncommon thing to you at all.

A. No.

Q. All right. Now when did you begin then to—did you hear from anybody about her?

A. I——

Mr. Smith: Pardon me just a moment. This is hearsay, your Honor

Mr. Legg: It is cross examination, your Honor. It is a question Mr. Smith introduced in the case, whatever you prove.

Mr. Smith: If it please the Court, we asked her what she knew about the girl and not what she heard about her.

The Court: Sustained.

Mr. Legg: All right.

Q. Now during the time that Dorothy Mae worked for you, for about four years, was she married to and living with Marvin Clewis?

A. Yes.

Q. And did you know and were you acquainted with Marvin Clewis?

A. He had been by to pick her up after work several times.

Q. And had you met him and talked with him, and so forth?

[fol. 95] A. Yes, in a casual way outside the house.

Q. During the time that she was working for you, did she sometimes receive telephone calls from Marvin Clewis or call him herself?

A. Yes.

Q. And from the nature of those conversations—did you listen to some of them?

A. No.

Q. Did you ever form any opinion from the nature of those conversations, or from anything else, about whether or not Marvin Clewis was good to Dorothy Mae as a husband?

A. I have the opinion that he was a good husband to her.

Q. That he was a good husband?

A. Yes.

Q. Would you say a very good husband?

A. Yes, I would say he was a very good husband.

Q. All right. Now, Mrs. Burford, during the time that Dorothy Mae worked for you, from time to time did she leave your house or was she brought to your house by other men?

A. Taxicabs would be one way. She had her own car and usually arrived in a car.

Q. Did she have telephone conversations with other men at your house?

A. Not that I know of.

[fols. 96-97] Q. Not that you know of. All right. Now you did say, though, that it was not uncommon for Dorothy Mae to be gone for a day or two or three or so at a time, and you wouldn't have heard from her or know where she was, and then she would come back. Is that right?

A. Yes.

Mr. Legg: All right, I believe that is all.

Mr. Smith: We have no further questions, Mrs. Burford.

(The witness was excused.)

Mrs. Shirley Jean Judie, a witness for the State, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

* * * * * * *

[fol. 98] Q. * * * What was your mother's name?

A. Dorothy Mae Clewis.

Q. And what was her name before it was Clewis?

A. Dorothy Mae Charles.

Q. And what was her husband's name when her name was Clewis?

A. Marvin Clewis.

Q. Is he in the courtroom now, please?

A. Yes.

Q. Would you point him out?

A. Over there. (Points to the defendant.)

Q. Is that the colored man seated over there?

A. Yes, sir.

Q. Now do you know where Marvin Clewis and Dorothy Mae Clewis were living in January of 1962?

A. Apartment 7 on East Davis Street.

Q. Would that be in the same apartment housing area that you were living in in Apartment 9?

A. A door down, I think.

Q. A door down.

A. A door down.

Q. Now in January of 1962, how old was your mother, Dorothy Mae Clewis?

A. Forty.

[fol. 99] Q. And about what size was she at that time?

A. Oh, she weighed 115 pounds.

Q. And was she more or less your size or a lot bigger or a lot smaller, or what?

A. She was my size, maybe about, just about a little taller than I am, not too much.

Q. All right. Were you ever around Marvin Clewis and Dorothy Mae Clewis at the same time?

A. Yes.

Q. Were you around them during that period of time that you mentioned while you were living in Apartment 9 and they were living in Apartment 7? Were you around them during that period of time?

A. I was over there most of the time.

Q. All right. Did you ever see or hear any trouble between them?

A. Yes.

Q. Did you ever observe any trouble between them in January of 1962?

A. Yes.

Q. Would you tell the jury about what you observed in January of 1962, please?

A. Ah, one night, on a Saturday night, they had went out to a matinee, and she came home——

[fol. 100] Q. Excuse me, by "matinee" you mean a dance?

A. A dance.

Q. And that could be at night time?

A. At night, one Saturday.

Q. All right, go ahead, please.

A. And she came home with a knot over her eye, came

home crying with one shoe on and one in her hand. A few minutes later her husband came, Marvin Clewis, and she came into my kitchen and told me Marvin had hit her.

Q. Just a second. Was Marvin there?

A. Yes.

Q. All right, go ahead, please.

A. He was setting in my bedroom, and she raised her dress up on the side and told us that Marvin had whipped her that night with a rubber hose, and it was real blue and red. I asked her, "Who hit you?" and she said, "Marvin." I turned to him and asked him why he had hit Mama. He told me that she was his wife and he would hit her any time he wanted to and me, too.

Q. He said it was his what?

A. It was his wife, and he told me he would hit her any time he wanted to and me, too.

Q. All right.

A. And one night I went over there to talk to my mother [fol. 101] and he was there, and I asked her to come over to my house so I could talk to her, and he said she wasn't going any place, and I says, "She can come over to my house if she wants to. That's my mother," and I told her, I said, "Come over there in a few minutes." By the time I got in the door, and I don't know what made me go to the back door, but anyway I went to the back door and I heard something outside. I cut the light off and went to the door. He was out there tussling and——

Q. Who was out there tussling?

A. Marvin and my mother. I opened the door, cut the light on, and there they were, and he had his hand around her neck.

Q. Pardon me, I didn't hear you.

A. Around her neck.

Q. He had what?

A. Choking her.

Q. Had what?

A. He had his hand around her neck.

Q. His hand?

A. His hand, uh huh, and she was saying to turn her loose, and I was going to have a baby then, I was real big, and I reached back into my drawer and comes out with a knife, and one of them kind of pushed me against

my house and by the time I got straight Marvin left and [fol. 102] went back over to his house, and I came over there and told him, asked him,—I told him he better not do it any more, and by that time my brother came in and asked me what was the matter, and I told him Marvin was choking my Mama in the back yard. I told him to come over to the house where I was and he was arguing and told me it was none of my business.

Q. Who said that?

A. Marvin.

Q. All right, had you ever heard the defendant, Marvin Clewis, threaten your mother other than these times you have just now told us? Have you ever heard him threaten her, threaten to kill her?

A. Yes.

Mr. Legg: Your Honor, I want to object to any further testimony along this line. We haven't objected up until now, so I let her testify to what she saw recently, but a general question as to whether she had ever heard anything like that would, of course, not be material in any way to any issue in this case. It would not be relevant and would be prejudicial to this defendant. Any evidence of previous transactions would have no bearing on the circumstances here.

Mr. Smith: If the Court please, 1257a says that all [fol. 103] relations between the parties in a murder case are relevant and can be testified to. All relations between the parties, prior relations between the parties, can be testified to.

Mr. Legg: Now, your Honor, that is his opinion about the law. I have read 1257a on many occasions—I guess you are talking about McCormick & Ray—and that is not what it says.

The Court: The Court will overrule the objection.

Mr. Legg: Note our exception.

Q. Go ahead, please. The question was, have you ever heard of Marvin Clewis, this defendant, threaten your mother other than these instances in January that you were just testifying about?

A. Yes.

Q. Would you tell the jury, please?

A. Well, she would be laying in the bed and he would be talking to her and he would tell her, "I told you, Dorothy, I'm going to kill you; if you keep on, I'm going to kill you."

Q. Did you ever hear him threaten her or not concerning other men?

A. Yes.

Q. Would you tell the jury about what you heard there, please?

[fol. 104] A. He told her, "If I ever catch you with Jimmy Davis or any other Negro, I'll kill both of you."

Q. "Airy other devil"—is that what you said?

A. Another one.

Q. I see.

A. Another Negro. "If I catch you with another Negro, I'll kill both of you."

Q. Where were they living at this time? Do you recall?

A. On East Davis, Apartment 7.

Q. All right. I show you, Mrs. Judie, what has been marked State's Exhibit 10, a picture, and ask you if you can identify State's Exhibit 10.

A. That's my mother, Dorothy Mae Clewis.

Q. All right, and tell the jury, please, does it or does it not substantially look like her as she looked in 1952.

A. It do.

Mr. Legg: Your Honor, we again object, of course, to the exhibiting of this picture for the reasons already stated.

The Court: All right.

Mr. Smith: (To Reporter) Did I say 1952 or 1962?

The Reporter: You said 1952.

Q. And does this substantially look like she looked in 1962?

[fol. 105] A. It does.

Q. Do you recall approximately when it was that Dorothy Mae Clewis disappeared?

A. It was sometime in January. I don't know the probable date.

Q. 1962?

A. 1962, because I was having difficulty.

Q. I beg your pardon?

A. I was having difficulty in having a baby. I would

be real sick, and one Sunday I came from church and I had told my grandmother that I was going to call in a Missing Person on my mother, and I did. The Sunday I came from church I called a policeman and he came and I talked to him, and her husband, Marvin, was across the street and I sent over across the street for him to come over there.

Q. You called? You what? You called across the street what?

A. He was across the street from where we stayed.

Q. Yes?

A. And I sent someone over there to tell him to come over here, that I had called the police officer and wanted him to tell the police something about Mama, and he kept standing there. I said, "Marvin, don't you know something you can tell?" and he just kept standing and looking at me.

[fol. 106] Q. Where was the policeman at this time?

A. He was in front of my house.

Q. Were you talking to the policeman?

A. Yes.

Q. I see, and was this when Marvin was standing there? Is that what you mean?

A. Yes.

Q. I see. Now you go ahead with what you were saying. Pardon me for interrupting.

A. And I asked Marvin, "Can't you tell them something? Don't you know something you can tell?" and he didn't say a word but stood and looked at me, and this policeman told him to come up there and file a Missing Person. He asked me was that her husband and I told him "yeah," and he never did, I don't think, to my knowing.

Mr. Legg: Your Honor, I ask that that testimony be stricken and the jury instructed to disregard it.

Mr. Smith: We agree, Your Honor.

The Court: The Court so instructs the jury to disregard the last statement of the witness.

Q. Now, sometime later did you and Marvin Clewis, the defendant, have occasion to be in his panel truck together?

A. Yes.

Q. Where were you all going at that time?

[fol. 107] A. Going down to Jimmy Davis' mother.

Q. All right, and did anything happen or, first of all, did anything happen on that trip down there?

A. Yes.

Q. Tell the jury, please.

A. We were riding down this gravel road, and he turned and I told him to stop right here before we get there, and he said there wasn't any use going on because she's not there, and I told him, I says, "I want to go down there, anyway," and I said, "Stop right here, because if she is there and you here," I says, "she wouldn't come out," and he stepped on his brakes real quick, and a pair of black shoes with three buttons on it slid out from under the seat.

Q. Whose shoes were those?

A. Which belongs to my mother.

Q. Were you familiar with the clothes of your mother?

A. Yes.

Q. Do you recall how she was dressed the last time you saw her alive?

A. She wore some black shoes with three buttons on them.

Q. Did these shoes that slid out from under the seat appear to be or not appear to be the same shoes?

A. They were.

Q. Would you know them if you were to see them again?

[fol. 108] A. Yes.

Q. I show you, Mrs. Judie, what has been marked State's Exhibit 12, and ask you if you can identify them.

A. Yes, she wore them to work every morning.

Q. Whom do you mean by "she"?

A. Mama.

Q. Dorothy Mae Clewis?

A. Dorothy Mae Clewis.

Q. Where was Dorothy Mae Clewis living in 1951, 1952, '53, and along in there? What town was she living in?

A. Waco.

Q. Were you living in Waco, also?

A. Yes.

Q. At that time?

A. Yes.

Q. I show you, Mrs. Judie, what has been marked as

State's Exhibit 2. Would you examine this, please? Can you identify State's Exhibit 2?

A. This is the black brassiere she wore Saturday night that she came over to my house with the knot over her head. They went to the matinee and she exchanged this brassiere, exchanged her brassiere for this brassiere with another girl, and she was trying to sew it up real quick to get ready to leave in it.

[fol. 109] Q. Trying to sew it up?

A. She was sewing it up.

Q. Do you know where it was being sewn? Was it too large or too small or what?

A. It was too large for her.

Q. And she sewed it up like you are doing there?

A. Yeah.

Q. You saw her working on State's Exhibit 2. Is that correct?

A. Yeah.

Q. I show you what has been marked State's Exhibit 3, and ask you if you can identify this.

A. This is an old belt that she used to whip the children with that had been broken and was too little for Marvin.

Q. You say "she." You mean Dorothy Mae Clewis?

A. Yeah. She used to whip my children with it when they came over to the house to keep them out of devilment.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. Shirley Jean, I am going to have to ask you some questions here.

A. All right.

Q. I don't know whether you know who I am or not.

[fol. 110] A. I do.

Q. My name is Reagan Legg, and I am Marvin Clewis' attorney in this case.

A. I know that.

Q. And I am here representing Marvin Clewis who is charged with the murder of your mother.

A. I know.

Q. You know that, don't you?

A. I do.

Q. And you have known it since July of 1962 that he was charged with the murder of your mother.

A. I do.

Q. All right, and, Shirley Jean, after your mother disappeared back there,——

A. Uh huh.

Q. —Marvin Clewis continued to live there in that apartment as long as he stayed in Midland, didn't he?

A. Well, he didn't stay there all the time, because in a few weeks I was told my mother was over at Odessa, and he would go over there and stay some nights, and sometimes he would come to my house at night and ask if I had seen her and then——

Q. When somebody told you she was staying in Odessa, why, he would go over there and stay at nights and look for her?

[fols. 111-115] A. Yes.

Q. All right, and then he would come by and ask you if you had seen her?

A. Yes.

Q. Did he do that nearly every day he was here?

A. Yes.

Q. Or if you had heard anything from her?

A. Yes.

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[fol. 116] Q. All right, and during that period of time did you ever talk to the police more than once about your mother disappearing?

A. I talked to the police once.

Q. And that is the time you told us about here awhile ago?

A. Yes.

Q. Now, Shirley Jean, did you think that Marvin had killed her?

A. I didn't think anything about Marvin.

Q. You didn't think anything about Marvin.

A. No, I didn't.

Q. Well, certainly, if you had heard Marvin tell her that he was going to kill her, and if you had seen all these

things happen and you had seen him put his hands around her neck, as you said, and if she had said that—as a matter of fact, he told you——

A. (Interrupting) Well, he did. Sir?

Q. He told you that he hadn't hit her that night that she had said she had been hit, didn't he?

A. He said he did. He said he had hit her and he would [fol. 117] hit me. That's his wife.

Q. He did?

A. Yes.

Q. He said he did hit her?

A. Yes. He said it in my bedroom.

Q. You knew all of those things, didn't you, Shirley Jean?

A. Yes.

Q. Didn't you tell the police about it?

A. No.

Q. Why didn't you?

A. I was more interested in my mother than I was in anything else.

Q. All right, you were more interested in your mother, and you knew these things had happened and they happened in your presence, hadn't they?

Mr. Smith: May it please the Court,——

Q. (Interrupting) Hadn't they? Hadn't they?

A. Yes.

Mr. Smith: (Continuing)—we object to counsel shouting at the witness, your Honor.

The Court: Sustained.

Q. And then during that period of time, after you stayed here and after your mother left, you didn't know [fol. 118] where she was and you hadn't heard from her, had you?

A. No.

Q. And you still didn't tell the police anything about these things that you come into this courtroom now and tell this jury that Marvin said in a threat that you say he made against your mother?

A. No, I didn't; he was standing out there.

Q. Why didn't you?

A. He was standing up there.

Q. He was standing there.

A. Yes, he was standing there.

Q. Was he standing there every day that you lived in Midland when you could have gone to the telephone and telephoned the police and they could have come and talked to you, or you could have gone by the police station or the sheriff's office or to any number of the law enforcement agencies in this town and told them about it?

A. No, because I had too much responsibility at home to see after it.

Q. You had too much responsibility at home to do something.

A. Yes.

Q. And to be bothered with it.

A. I was bothered with it.

[fol. 119] Q. Well, you don't mind coming into court now, though, do you, and telling all these things to the jury?

A. I am telling it because it is true. I would never lie on Marvin.

Q. Why didn't you tell it because it was the truth then?

A. Well, I just didn't tell it then.

Q. Well, the truth of the matter is, Shirley Jean, you didn't say anything about this and didn't do anything about it for quite awhile because this was not an unusual thing for your mother to leave and for you not to hear from her for a good while. Isn't that true?

A. She would leave but she wouldn't stay but about two days, sometimes a day, and she would come home.

Q. You wouldn't know where she was?

A. No.

Q. And Marvin wouldn't know where she was?

A. I don't know if he knowed or not; I couldn't say that. I didn't know if he knowed where she was or not.

Q. Well, do you know where she went when she left those times?

A. No.

Q. Well, you do know that she was going with Jimmy Davis, don't you?

A. Yes.

[fol. 120] Q. All right, and you do know that she was going with some other men, too.

A. Yes.

Q. All right. And when you were in the truck with Marvin and said you wanted to go down to Jimmy Davis' house——

A. I said "mother's."

Q. His mother's house.

A. Yes.

Q. To see if your mother was there?

A. Yes.

Q. Why, you thought certainly that that's where she might be, didn't you?

A. I thought probably she would be down there.

Q. And you say you saw these shoes that Mr. Smith showed you awhile ago?

A. Yes.

Q. You think she had those on the last time you saw her?

A. Yes.

Q. When was that?

A. I couldn't tell you the exact date, but it was in January when she left.

Q. If it was in January when she left, well, when was the last time you saw her? Don't you remember the last time you saw her? That's not hard to remember, is it?

[fol. 121] A. Yes, it is hard to remember. If you want to look it up in the calendar, which I don't know—all I know is the day when she left, but I couldn't tell you what date it was.

Q. Well, was it in the morning, the evening, night, or what?

A. It could have been over in the evening or up in the evening, but I couldn't say.

Q. You don't know what day of the week it was?

A. I think it was on Monday.

Q. On Monday?

A. Uh-huh.

Q. The last time you saw her?

A. Uh huh.

Q. But you don't know that.

A. No.

Q. And what was she doing when you saw her? Going to work, or what?

A. No.

Q. She had been to work?

A. I really don't know.

Q. Well, now, Shirley Jean, you said you lived there and were over there practically all the time.

A. Yes.

Q. And you think it was on Monday that you last saw her.

[fol. 122] A. Well, she wasn't going to work. I don't think she had been to work.

Q. She hadn't been to work?

A. I don't think so. Like I say, I don't know if she had been to work or not.

Q. Had she been at home the last day or two before that?

A. No, because that was the Saturday night that her and Marvin had all that disturbance, and she came over to my house with Marvin's little daughter to spend the night and got in my room in the bedroom—I had two bedrooms—she came in my room, and Marvin went back over there and throwed all her clothes outdoors, and then I seen her that Monday.

Q. That was on Monday when that happened?

A. That was on Saturday night when that happened, and I didn't see her no more until that Monday.

Q. You say he threw her clothes out and she went back home and spent the night?

A. I don't know. I don't think so.

Q. You don't think so?

A. No.

Q. Where did she go?

A. I don't know.

Q. Was she there all day Sunday?

A. No.

[fol. 123] Q. What time Monday did she come there?

A. Like I said awhile ago, I don't know. It could have been morning, it could have been evening.

Q. Was Marvin there?

A. No.

Q. Did she leave then before Marvin got there?

A. Yes.

Q. Marvin had been working that day?

A. I don't know if Marvin were working or not.

Q. Well, was he there at all that day? You know that, don't you?

A. No, I don't think so. Some days Marvin didn't work.

Q. Most days he did, though, didn't he?

A. Most days he did, because one time I went out there. while my mother was working, and there was Marvin walking around the corner.

Q. All right. You told Mr. Smith that you had seen this belt before. How do you know, Shirley Jean?

A. I knowed because she used to whip the children with it and used to be Marvin's belt, and I think——

Q. How do you know about that?

Mr. Smith: Pardon me. Your Honor, she is trying to answer the question. I would appreciate it if he would let her finish it.

[fol. 124] Q. I didn't mean to interrupt you, Shirley. Go right ahead.

A. Well, like I said awhile ago, she used to whip the children with the belt, and she never did like for the children to fool with anything, and it got—Marvin used to wear it and I think it broke half in two, and she would take it to whip the children with it to keep them out of devilment.

Q. Shirley, how can you look at this belt and say that is the same belt?

A. Because it was broke off, and I know it.

Q. It was broke off and you know it.

A. Uh huh. Like I say awhile ago, I wouldn't tell a story on Marvin.

Q. Where did they keep this belt?

A. Laying around on the dresser and on the sofa.

Q. Do you know when this Saturday night was that you were talking about here a little while ago?

A. Well, it was the Saturday night that they were having a matinee. I call it a matinee because that's what I hear some other people call it.

Q. You say you saw your mother working on that brassiere, whenever that Saturday night was?

A. Yes, and she wore a gold dress with it.

Q. And what time did your mother leave the house that night?

[fol. 125] A. She and Marvin left together.

Q. What time?

A. Well, I don't know what time she left.

Q. What time did they come back?

A. I don't know what time they came back, but I know it wasn't after midnight when they came back.

Q. You say you heard Marvin tell your mother "if I ever catch you with Jimmy Davis again" that he would do something to her?

A. Or anyone else, yes.

Q. What did he say he would do, whip her?

A. He said he would kill her.

Q. Kill her?

A. Yes.

Q. And you had heard Marvin say, you are telling this jury, that he would kill your mother?

A. Yes.

Q. And yet you never did tell anybody that until after this grave was found out here north of town. Is that right?

A. Yes. I may have told my grandmother and my brother.

Q. But, anyway, nobody ever reported Marvin for anything, did they?

Mr. Smith: May it please the Court, that calls for a conclusion.

[fol. 126] Q. I mean, you never did to the police. You never did tell them about it?

A. Come again? What did you say?

Q. You never did tell the police about it?

A. No, I never did, but I had got uneasy then and I called the police to see if they could find her.

Q. I know, but when the police came out there to see if they could find her, didn't they ask you about where you thought she might be?

A. I don't remember that; I don't think so.

Q. Well, what did you all talk about?

A. I told them that my mother was missing and she hadn't came home. He asked me did she have a husband,

"where was her husband," and I said, "Across the street," and he says, "Why don't he come up and make a Missing Persons?"

Q. And you called Marvin on over there and said, "Come on over." Is that right?

A. Yes.

Q. And he came.

A. Yes.

Q. And you said, "Don't you have something to tell this policeman?"

A. Yes.

Q. And he just stood there and looked at you.

[fols. 127-130] A. Yes.

Q. What did you think he was going to tell the policeman?

A. I wouldn't know. He had a good deal to tell, if he wanted to tell.

Q. So did you, didn't you?

A. Yes.

Q. But you didn't.

A. No.

Q. And you never did.

A. Like I said awhile ago, I probably told my grandmother.

Q. But you never did tell the policeman.

A. No.

* * * * * * *

[fol. 131] MOTION TO SUPPRESS AND EXCLUDE CONFESSIONS AND COLLOQUY BETWEEN COURT AND COUNSEL

Jury Retired

Mr. Legg: We would like for the record to show, your Honor, that prior to, and I think just prior to, the offering in evidence and the interrogating of the witness Gene Howell concerning a voluntary statement or statements made by Marvin Clewis, alleged to have been made, that we had presented to the Court our Motion to Exclude and to Suppress Confessions which we have reason to believe were taken by the State in connection with this case from Marvin Clewis. These are the con-

fessions which we previously, by motion, asked the Court to require the State to produce for our examination and inspection, and which Motion was overruled, and to which the defendant respectfully excepted. I might say this to you, your Honor, that under the law we are entitled—I don't think Mr. Smith would disagree with me about this—to put on testimony in support of our contention that any or all of such confessions are inadmissible as a matter of law. We are very serious in urging this Motion under the decisions of the Supreme Court of the United States and under the decisions of the Texas Court of Criminal Appeals. We believe there is no question but that any or all statements taken by the State are inadmissible absolutely under the law and would be a fundamental denial of due process under the Fifth and the Fourteenth Amendments [fol. 132] to the Constitution of the United States, that they were taken under such conditions and that it would be a serious, a prejudicial, a very damaging and inflammatory circumstance against this defendant if any or all of such written statements were placed into evidence. We are prepared to present testimony to the Court in support of our contention. While Mr. Howell is here presently on the stand, we have no objection to the State proceeding, if they want to. We will follow any procedure that the Court should designate, but we do want to seriously, very seriously, urge this Motion and to develop it as fully as possible out of the presence of the jury, and we have moved that the statements and all of them be stricken and be suppressed and excluded as a matter of law, that there is and was denial of the fundamental rights of this defendant in the circumstances leading up to the obtaining of these particular confessions.

Mr. Smith: If the Court please, the law is the same as it was, of course, a few hours ago when the other motion was made. Any statements, written statements of the defendant, that are in possession of the State, the State does not have to show them until it is prepared to introduce them, if so, into evidence. At that time, of course, they will have to be shown to the defense before they can be introduced. Now, then, if the defense has any evidence to put on as to whether or not the statements are illegal, [fol. 133] as a matter of law, then, of course, they can

put on evidence to that effect to see if there is a legal reason for saying why the Court should exclude the statement or statements, but until there is undisputed evidence that the confessions are inadmissible, they are admissible as a matter of law. Now, if counsel wishes to go into this, I think the proper procedure under the law would be for me to take Mr. Howell on Direct and then let the defense go into whatever matters that are proper under the law to show whether the confession is admissible or otherwise, not as to a bunch of other irrelevant material, but to the admissibility of the confession, as a matter of law. At this stage, though, they are not entitled to see the confessions until more evidence has come from the witness stand.

Mr. Legg: All right, then, your Honor, we would call, in support of our Motion, Marvin Clewis, the Defendant, to the witness stand for the purpose and the only purpose of testifying with reference to our Motion and to the statements in this case and for no other purpose.

Mr. Smith: Your Honor, the officer who took the statement goes first and then after the officer has testified and proved up the statement on Direct, then, if the defense wishes to put on the defendant out of the presence of the jury and to bring on evidence that the confession is in-
[fol. 134] admissible as a matter of law, he can do that, but first things first. First, Gene (Howell) testifies and then we offer to introduce it and then, if they want to object to it and put on evidence as to why it is inadmissible, then they do so. That is the order of procedure on that.

Mr. Legg: It is obvious, Mr. Smith, that you have been reading the same law I have. This Motion to exclude these confessions could have been filed at the beginning of the trial and we could have had arguments on it then; it could have been filed sometime this morning and we could have had argument on it then; it is filed now, your Honor, and we are offering to and want to present testimony on it which we believe will conclusively show that any statement or statements taken from this defendant were involuntary and are inadmissible in this case as a matter of law. That is the proper procedure, incidentally, and the only procedure that has been followed in any of these cases.

Mr. Smith: As we have done before, your Honor, we have to introduce the thing and we can't introduce it until

the officer testifies about taking it, and then they come in and cross examine or put on evidence to show that it is inadmissible. They can't do anything about the confession until we have introduced it or have moved first. That is the way we have always done and that is the way it is to be done.

[fol. 135] Mr. Legg: This is absolutely incorrect in toto, your Honor. This is a Motion, a written Motion, filed before the Court. Now, what Mr. Smith wants to do is to go ahead and ask him all about this confession and go into everything about it and then when he offers it into evidence have the jury retired and have his argument about it. Now, your Honor, that is prejudicial and the courts have recognized it as such, and throughout all the cases, both the Supreme Court of the United States—and I have read them all, I have read them all carefully, I have briefed them all carefully—I have briefed them all carefully—I got a hundred pages of notebook paper here, and I know what I am talking about. We are asking that this Motion be heard now.

The Court: You have to get the thing in focus, Mr. Legg.

Mr. Legg: Not as far as the jury is concerned, your Honor.

The Court: Well, suppose the State doesn't introduce the confession?

Mr. Legg: He has already had it marked and is fixing to interrogate Mr. Howell about it, and that is why I brought up the Motion hearing now. I don't want anything before this jury about the confession, your Honor.

[fol. 136] The Court: It is not before the jury but it is going into the bill for your Motion.

Mr. Legg: Well, since I filed the Motion it is my burden to present testimony and he can rebut it.

Mr. Smith: No, sir, your Honor, he is not entitled to these confessions at all, and this Motion is no good as of right now. He is not any more entitled to the confessions now than he was a week ago.

Mr. Legg: I am not asking for the confessions. I have told you that I don't even care to see them; I want to tell you that these confessions are inadmissible. The Court has got a right to look at them at any time he wants to and can in connection with this Motion.

Mr. Smith: If the Court please, this is the improper time to go into this. We have to have the thing identified and then we offer it for evidence and then he makes his objection. He is getting the cart before the horse. Now he can make any motion he wants to but it is without grounds at this stage.

Mr. Legg: Your Honor, I am not filing an objection here to anything he has done. I have filed a Motion to exclude these statements. Now you just have to believe that. The cases uniformly hold that a person who files such a motion is entitled at that time and prior to the time the confession is offered into evidence and anybody has [fol. 137] been asked anything about it, to go into his motion and, if the motion is granted, then the confession is excluded, and, if not, why, then we present all this before the jury. That is the law; I wouldn't mislead you. I think it would be reversible to do otherwise.

The Court: The Court is going to have to hear the whole pattern of the thing anyway, Reagan.

Mr. Legg: Yes, sir.

The Court: It is just a question of how to proceed, whether to hear you first and the State later.

Mr. Legg: Your Honor, what he is saying is that he is entitled to bring the jury back in and bring this statement up here and ask Mr. Howell about it and go through the Motion and then, when he offers it in evidence, only then can this be heard. He is not arguing how we proceed on this particular thing, but the truth of the matter is that we are entitled to go into it now at this point and we don't have to wait until he offers the thing into evidence because of the alleged facts in there. They took these statements. Mr. Smith knows it and I know it; the newspaper reports carried it.

The Court: I will be glad to hear it, but I think the proper way will be to have the State ask the witness, out of the presence of the jury, pertaining to the paper offered, [fol. 138] just like they do before the jury and, after they get through, you make your bill in support of your motion.

Mr. Legg: That is all right with me as long as that is outside the presence of the jury.

The Court: It will be outside the presence of the jury.

Mr. Legg: And if that is the way you want to go on

that, that's fine, but you were saying that you wanted to bring the jury back. That was my understanding.

Mr. Smith: Wasn't that what you said, Judge? Wasn't that what you said, sir?

Mr. Legg: No.

The Court: We will take it right now. Is that all right with you, Mr. Smith?

Mr. Smith: Yes, sir, we will do it that way. That will be fine. Are we ready?

The Court: Yes.

[fol. 139] HEARING ON DEFENDANT'S MOTION TO EXCLUDE AND SUPPRESS CONFESSIONS

Mr. Smith: I will ask that Mr. Howell take the witness chair.

GENE HOWELL, witness for the State, takes his seat in the witness chair and testifies as follows in the hearing on Defendant's Motion, said witness having previously been sworn in the case:

Direct Examination.

By Mr. Smith:

Q. You are Gene Howell, the same witness who was on the stand a moment ago.

A. Yes, sir, I am.

Q. I believe you said you know Marvin Clewis.

A. I do, yes, sir.

Q. The defendant in this action.

A. That's right.

Q. Now I show you what has been marked State's Exhibit 13 and ask you if you can identify it.

A. I can, yes, sir.

Q. All right, what is it, please, sir?

A. It is a voluntary statement made to me by Marvin Peterson Clewis.

[fol. 140] Q. That the defendant in this action?

A. It is.

Q. Would you tell the Court, please, whether or not Marvin Peterson Clewis signed State's Exhibit 13 in your presence?

A. He did.

Q. And tell the Court, please, whether or not before he made State's Exhibit 13—by the way, did he make it to you?

A. He did, yes, sir.

Q. Before he made State's Exhibit 13 to you, did you first warn him that he did not have to make any statement at all?

A. I did.

Q. And any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement was made?

A. I warned him to that exact effect, yes, sir.

Q. Will you tell the Court, please, sir, whether or not he made the statement, State's Exhibit 13, freely and voluntarily?

A. He did.

Q. Tell the Court, please, whether or not there was any undue persuasion used toward the defendant to get him to make State's Exhibit 13.

[fol. 141] A. None whatever.

Q. Was there any promise of reward to get him to make State's Exhibit 13?

A. There was not.

Q. Is the defendant here the same one who made State's Exhibit 13?

A. He is, yes, sir.

Mr. Smith: We offer State's Exhibit 13 into evidence.

Mr. Legg: Now, of course, your Honor, we do object for reasons stated in our Motion and will offer testimony in support of that Motion. We, of course, are objecting to the introduction of this, as we will do in front of the jury when this procedure occurs, if it occurs. Now if the Court desires us to, we will talk to Mr. Howell about it right now in order to save time, and then we will put Mr. Clewis on the witness stand. Is that——

The Court: That is all right.

Mr. Legg:—the manner in which you want us to proceed?

The Court: It doesn't make any difference, Reagan. It will probably be all right. Go ahead and ask Mr. Howell. He is on the stand.

[fol. 142] Cross-examination.

By Mr. Legg:

Q. Mr. Howell, for the purposes of this Motion and in connection with the confession, I will ask you this: Now I believe you say here that this statement was taken on July 17, 1962.

A. That is correct.

Q. What day of the week was that?

A. If I remember correctly, I believe it was on Monday.

Q. If it were on Tuesday, according to the calendar, you wouldn't quibble with that, of course.

A. No, sir, I would not; I don't remember the exact day.

Q. And it was some time in the morning of that day?

A. It was.

Q. When had Marvin Clewis been delivered into the custody of the Sheriff of Midland County, Texas?

A. The Friday previous to the taking of this statement.

Q. All right, would that be on the 13th of July if the calendar would indicate that the previous Friday——

A. If that is what it indicates, yes, sir, it was on Friday.

Q. All right. Now did you discuss anything with Mr. Clewis at that time?

A. On the Friday?

[fol. 143] Q. Yes.

A. I did not.

Q. The first time you saw him then was on the morning of Tuesday, July 17th?

A. It was not the first time I saw him; it was the first time I talked with him.

Q. The first time you talked to him about anything in connection with this case.

A. That is correct, yes, sir.

Q. Now, Mr. Howell, I will ask you this: When you brought Mr. Clewis to your office, I assume Mr. Guy Fletcher was also present. Is that right?

A. He was, yes, sir.

Q. Did Marvin Clewis admit at first any guilt in connection with this offense, or did he deny it?

A. Prior——

Q. When he first came to the office.

A. When he first came to the office, he *denied it.*

Q. All right, and then did you talk to him for some period of time thereafter?

A. Yes, sir, I did.

Q. And did he still deny it?

A. For a brief time, yes, sir.

Q. All right, and you say for a brief time.

[fol. 144] A. Several minutes.

Q. Well, when you say several minutes, Mr. Howell, wouldn't you say it certainly was closer to an hour than it was any other common fraction of time?

A. No, sir, I would say closer to half an hour, probably, during the period of denial.

Q. All right. Now then, after you had talked to him, did you then call someone else into the office?

A. I did.

Q. And who was that?

A. Mr. Joe Mims, District Attorney.

Q. The District Attorney.

A. Yes, sir.

Q. Did he come down there then and did he for some period of time talk with Marvin Clewis?

A. He did.

Q. And thereafter, then, did Marvin Clewis make a statement to you?

A. He did, yes, sir.

Q. Now, Mr. Howell, did Marvin Clewis mention to you, prior to the time you took this statement and during the time he was in your custody in the sheriff's office, anything about having been abused, physically or otherwise, at the hands of any other officer since he had been taken into [fol. 145] custody for this offense?

A. Prior to the taking of the statement, yes, sir.

Q. He did?

A. Yes, sir.

Q. And could you tell us the substance of what he told you?

A. He said that he had been abused by other officers.

Q. Did he name them?
A. I don't believe by name, no, sir.
Q. How did he identify them?
A. He identified one as a city detective.
Q. All right.
A. And I believe a Ranger.
Q. A Ranger?
A. Yes, sir.
Q. Anybody else?

Mr. Smith: Pardon me, did he say "a" Ranger or "the" Ranger? I didn't hear him.

The Witness: A Ranger, I believe. He didn't say the Ranger.

Mr. Smith: Thank you.

A. And I believe he said the polygraph operator.
Q. All right, at the Department of Public Safety?
A. That is correct.
[fol. 146] Q. In Midland?
A. Yes, sir.

Mr. Legg: Now, your Honor, of course, we don't—for the purposes of this Motion only we are not objecting to any testimony with reference to polygraph or polygraph tests. The law is clear that none of that should be admitted before the jury, but for the purposes of this Motion and developing the facts as they occurred, why, we interpose no objection to it.

Q. Now, did he tell you that threats had been made against him?
A. He told me that, yes, sir.
Q. Did he tell you that he had been physically assaulted?
A. He said he had.
Q. Did he seem anxious to tell you these things or was he, in a sense, reluctant to do so?
A. He wasn't anxious to; he was reluctant to talk about any of the situation.
Q. But he did tell you those things, and that was on the 17th of July, 1962.
A. He told me those things, yes, sir.

Mr. Legg: I believe that is all.

[fol. 147] Redirect examination

Mr. Smith:

Q. You know of your own knowledge, Mr. Howell, of any abuse to this defendant?

A. I do not, no, sir.

Q. Did you abuse him in any way?

A. No, sir.

Q. Did you say anything to the defendant that you certainly were not going to do anything to him one way or the other no matter what he did?

A. Yes, sir, I did.

Mr. Legg: Of course, your Honor, that is a leading question, to which we object.

Mr. Smith: It is leading because it is cross. Maybe it isn't cross.

Mr. Legg: I don't believe it is cross.

Mr. Smith: I don't believe it is cross, but I believe it is straightening up a matter that counsel went into.

Q. Did you or not give him any type of assurance or make any statements to him before taking the statement, State's Exhibit 13, about his welfare, what you would or would not do, or something of that nature, before you took State's Exhibit 13, the confession?

[fol. 148] A. I told him that irregardless of anything that he might say or might do or might not say or might not do, that he had nothing to fear, that no harm would come to him in any way, that he would not be abused or even talked to any longer, if he desired not to be.

Q. Who else was present at the time? Just you and Mr. Fletcher?

A. Mr. Fletcher, yes, sir.

Q. Were there any city police officers present at the time?

A. There were not, no, sir.

Q. Was there a Texas Ranger present at the time?

A. No, sir.

Q. Was there a polygraph operator?

A. There was not, no sir.

Mr. Smith: I don't believe we have any further questions.

Recross-examination.

By Mr. Legg:

Q. Mr. Howell, did you mention to him prior to the time that he gave you the statement, which you say he did give you freely and voluntarily, did you mention to him the possibility of giving him another polygraph test?

A. Yes, sir.

Q. He said he didn't want to do that again, did he?

[fol. 149] A. I don't believe that is what he said, Mr. Legg.

Q. Well, all right, what did he say?

A. I believe he said he would be willing to take one.

Q. Said he would be willing to take one.

A. Yes, sir.

* * * * * * *

Redirect examination.

By Mr. Smith:

Q. Did you or not try to call anybody in defendant's behalf or was there anything of that nature——

A. Yes, sir.

Q. —before taking State's Exhibit 13?

A. Yes, sir, I did try to call someone.

Q. At whose request was this?

A. At no specific request. The defendant mentioned that he would like to talk to someone.

Q. All right, what was said, what else was said?

A. I asked him who he would like to talk to and he said, well, he didn't know for sure. I asked him if it would be a lawyer, and he said, "I would like to talk to my boss man."

Q. All right, and then did you try to put in a call to his boss man?

A. I did place a call to his boss man in Odessa, yes, sir.

Mr. Smith: We have no further questions.

[fol. 150] Recross-examination.

By Mr. Legg:

Q. During the time that he was in jail, in the county jail here, from Friday until Tuesday, Mr. Howell, did he at any time confer with a lawyer or receive any legal advice or have any counsel?

A. Not to my knowledge, Mr. Legg.

Q. And, to your knowledge, none had been appointed for him.

A. Not to my knowledge, no, sir.

* * * * * * *

Marvin Clewis, the Defendant, called by the Defense in support of its Motion to Exclude and to Suppress Confessions of the Defendant, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Legg:

Q. Your name is Marvin Clewis?

A. Yes, sir.

[fol. 151] Q. Now, Marvin, how old are you?

A. Thirty-seven.

Q. And how long have you lived in Midland?

A. Ever since '52.

Q. Marvin, where did you come from, incidentally?

A. Palestine, Texas.

Q. And were you in the service?

A. Yes, sir.

Q. How long?

A. I was in it just about three years.

Q. And what branch of the service was that?

A. United States Navy.

Q. In the Navy.

A. Yes, sir.

Q. Marvin, when did you first hear that a body had been found northwest of Midland?

A. I first heard it on Friday.
Q. You remember what Friday that was?
A. It was Friday after the 4th of July.
Q. All right. Now how did you come to learn of that?
A. I came in from work one evening and I got a telephone call.
Q. Who called you?
A. Elizabeth Johnson.
[fol. 152] Q. All right, and she told you about it?
A. Yes, sir.
Q. Did she say anything about it with reference to who it was?
A. No, sir.
Q. Did she say who they thought it might be?
A. Well, no, sir, she didn't say that.
Q. Now then, when did you after that come to Midland?
A. I came to Midland Saturday night.
Q. All right, and why did you come?
A. When I got in from work Saturday evening, I had another call——
Q. Incidentally, where were you working?
A. I was working in Borger.
Q. Borger?
A. Yes, sir.
Q. That is Borger, Texas?
A. Yes, sir.
Q. In the Panhandle up here.
A. Yes, sir.
Q. And for whom were you working?
A. Vaughn & Taylor Construction Company.
Q. Now was this the times that we were referring to in the year 1962?
[fol. 153] A. Yes, sir.
Q. In July?
A. Yes, sir.
Q. How long at that time had you been working for Vaughn & Taylor Construction Company?
A. About seven years.
Q. And what did you do for them?
A. I was a dope foreman.
Q. On a pipe line crew.
A. Yes, sir.

Q. Construction crew.

A. Yes, sir.

Q. All right. Now, Marvin, we will go back to where we were. Now you say you came in from work Saturday evening.

A. Yes, sir.

Q. All right, then what happened?

A. Well, when I came in I came straight to the courthouse.

Q. When you came to Midland?

A. Yes, sir.

Q. Well, why did you happen to come to Midland that night?

A. Well, the call said the sheriff, the deputy sheriff, wanted to talk to me.

Q. You got a call where?

A. In Borger, Texas.

[fol. 154] Q. In Borger?

A. Yes, sir.

Q. Who from?

A. From my sister.

Q. All right, and she told you the deputy sheriff wanted to talk to you?

A. Yes, sir.

Q. And had you planned to come to Midland at that time, or not?

A. No, sir.

Q. Now, after she told you that the deputy sheriff wanted to talk to you, what time of the day was that?

A. It was around six or six fifteen. We usually got off at 5:30.

Q. All right. Did you have a car in Borger?

A. Yes, sir.

Q. And did you come to Midland in that car?

A. Yes, sir.

Q. And when you got to Midland, what did you do? You say you went straight to the courthouse?

A. Yes, sir.

Q. And who did you see there?

A. Well, it was a deputy sheriff on duty.

Q. All right, about what time of the night was that?

[fol. 155] A. I would say it was around 11:30 or 12:00 o'clock, somewhere along there.

Q. All right, and did you tell them who you were?

A. Yes, sir.

Q. And what happened then?

A. Well, he called somebody over the telephone.

Q. All right, and did that person then—did you see him?

A. Yes, sir.

Q. Who was that?

A. I don't know him by name, but I know him when I see him.

Q. Did he testify here this morning?

A. Yes, sir. I believe he was the second officer that testified, or first officer.

Q. Was his name Mr. Kirksey?

A. Yes, sir, that was it; Mr. Kirksey.

Q. All right, and did Mr. Kirksey question you about this thing?

A. Yes, sir.

Q. For how long?

A. Well, they questioned me from the time he got there up until about 2:00 o'clock.

Q. All right, in the morning?

[fol. 156] A. Yes, sir.

Q. And where did you go then? Did they put you in jail?

A. No, sir.

Q. All right, what happened?

A. He told me to go home and be back down there at eight o'clock or nine, I don't exactly remember. I believe it was eight or nine, Sunday morning.

Q. Sunday morning?

A. Yes, sir.

Q. All right, and this you say was somewhere around two o'clock or thereabouts on Sunday morning.

A. Yes, sir.

Q. Now then, did you go back down there next morning at eight o'clock?

A. No, sir.

Q. What happened?

A. An officer came.

Q. Who was that officer?

A. He said his name was Sgt. Morales or Morallis.

Q. Morales?

A. Yes, sir.

Q. Marvin, did I ask you what grade you finished in school?

A. No, sir.

[fol. 157] Q. What grade did you finish?

A. Fifth.

Q. All right. Now, where did you see Sgt. Morales?

A. At 1114 East Estes.

Q. And at what time?

A. It was around 6:30.

Q. Now was that in the morning or afternoon?

A. That was in the morning.

Q. Around 6:30 in the morning.

A. Yes, sir.

Q. Now this—is this on Sunday morning?

A. Yes, sir, Sunday morning.

Q. Just a few hours after you had left the sheriff's office here.

A. Yes, sir.

Q. All right. Now what did you do when Sgt. Morales came?

A. Well, I was in bed and I got up.

Q. All right?

A. And I went in and he asked me if I was Mr. Clewis and I said "yes, sir."

Q. Was he in the house?

A. Yes, sir.

Q. All right, what did he say to you?

[fol. 158] A. Well, he told me to come on and go with him.

Q. Come on and go with him.

A. Yes, sir.

Q. Did he tell you who he worked for?

A. No, sir.

Q. What did you say to him, if anything?

A. I told him I was supposed to be back up to the courthouse at eight o'clock.

Q. What did he say to that?

A. He told me to just come on and go with him.

Q. All right. Did he say anything about whether you should go to the sheriff's office or not?

A. No, sir.

Q. Now what happened after that?

A. Well, we went on to the car.

Q. His car or your car?

A. His car.

Q. All right, go ahead.

A. And he came to the police station down here.

Q. Police station?

A. Yes, sir.

Q. What happened when you go- to the police station?

A. Well, when I got to the police station he told me to take everything out of my pockets and leave it at the desk.

[fol. 159] Q. Did you do that?

A. Yes, sir.

Q. Now where was that in the police station?

A. That was downstairs.

Q. All right, and then did he lock you up?

A. No, sir.

Q. What did he do?

A. Well, we went upstairs to an office up there.

Q. The office?

A. Yes, to an office upstairs.

Q. All right, what did you do in that office?

A. Well, when we got in there he started asking me questions.

Q. Questions about what?

A. He started asking me questions. First, he asked me about did I know that they had found the body of my wife. I told him no, sir, I didn't.

Q. All right, and how long did he talk to you then?

A. He talked at least an hour and a half or two hours.

Q. All right, and then did he put you in jail?

A. No, sir, not at that time.

Q. All right, and what happened then?

A. Well, another officer came up.

Q. You know who he was?

[fol. 160] A. No, sir, I don't know him by name, but I seen him out in the hall awhile ago.

Q. What does he look like?

A. Well, he is a tall guy and he has got kind of blonde

hair and I believe he's got, it looked like a wart or something up the side of his eye.

Mr. Smith: He has got a what on his eye?

The Witness: He's got a knot up here somewhere.

Q. All right, did he talk to you then for awhile?

A. Yes, sir.

Q. Did he ask you questions?

A. Yes, sir.

Q. What kind of questions?

A. Well, he asked me the same thing Sgt. Morales asked me, about my wife and the disappearance of her and did I kill her.

Q. What did you tell them?

A. I told him no, sir.

Q. Did you tell Sgt. Morales that, too?

A. Yes, sir.

Q. All right, and how long did he talk to you then, this other fellow?

A. He talked to me around an hour, maybe a little longer. I had no way of telling.

[fol. 161] Q. And then did they put you in jail or take you anywhere?

A. Well, yes, sir, they told me then they would have to hold me.

Q. All right, and what happened after that?

A. Well, he carried me back to the cell and locked me up.

Q. Did you stay there then the rest of the day?

A. No, sir.

Q. How long did you stay there? Do you know?

A. I don't know exactly, but I stayed there better than an hour. I don't know, it may have been two hours.

Q. Did they bring your breakfast or anything like that?

A. No, sir.

Q. Now, then, what happened after you were in your cell for an hour or so?

A. Well, they came back and got me.

Q. Who is "they"?

A. Sgt. Morales.

Q. Anybody else?

A. It was an officer wearing a uniform with him.

Q. You don't know who he was?

A. No, sir.

Q. Did they take you anywhere?

A. Well, they took me back to his office there.

[fol. 162] Q. Same place?

A. Yes, sir.

Q. Talked to you some more?

A. Yes, sir.

Q. Question you some more?

A. Yes, sir.

Q. How long?

A. From two to two and a half hours.

Q. Now, Marvin, did they question you most all of that day?

A. Yes, sir.

Q. Were there any times in that day when they would take you back to your cell and leave you?

A. Well, yes, sir, once or twice.

Q. Once or twice. Did you stay there very long?

A. No, sir.

Q. How long would you say? Just estimate how long you might have stayed in your cell.

A. Oh, the first time after they carried me back I stayed there longer than I did any other time. The next time I wasn't there over thirty minutes, twenty-five or thirty-five.

Q. All right. Now, did they feed you any lunch or offer you anything to eat that day?

A. No, sir.

[fol. 163] Q. Did you ask for anything to eat?

A. No, sir, not at that time.

Q. All right. Now, then, when it got dark, let's say, were they still questioning you at that time?

A. When it got dark?

Q. Yes, sir.

A. Yes, sir.

Q. And did they question you any after dark?

A. Yes, sir.

Q. For how long?

A. Well, they questioned me way over in the night. I don't know.

Q. Well, let's say, would they question you until midnight or longer?

A. Yes, sir, it was after midnight.

Q. One o'clock, two o'clock, three, when? Do you know?

A. No, sir, I don't know; I would say around two, anyway.

Q. Now was that the same people questioning you or was there anybody else?

A. There was another guy questioning me that night.

Q. Who was that?

A. Well, he was a heavy-set guy.

Q. All right. Now, did they question you all at once? Were they all in the room, or would they come and one of [fol. 164] them question you and leave and another one question you, or what? How did it take place?

A. Well, one would question me for awhile, and he would leave and the other one would come in and question me.

Q. What were they trying to get you to do, Marvin?

A. They wanted me to agree to take a polygraph test.

Q. That night?

A. That day and night or day.

Q. All right, did you finally agree to do that?

A. Yes, sir, I agreed to take it that day.

Q. All right, you mean they questioned you even after you did that?

A. Yes, sir.

Q. And what were they trying to get you to do then?

A. Well, they wanted me to make a confession.

Q. Make a confession?

A. Yes, sir.

Q. Had you denied killing your wife or of knowing anything about it?

A. Yes, sir.

Q. And you denied it at all times?

A. Yes, sir.

Q. Did you deny it at all times until they quit questioning you about one or two o'clock in the morning?

[fol. 165] A. Yes, sir.

Q. Now then, did they take you back to your cell then?

A. After I signed the ——?

Q. No, after —— I believe you said you signed that in the daytime.

A. Yes, sir, I signed that Sunday evening.

Q. No, I am talking about that night after they finished

questioning you. Did they then take you to your cell, or did they take you to some other place?

A. Well, they took me back to my cell.

Q. They did?

A. Yes, sir.

Q. All right. Now, did they question you any more the next day?

A. Well, they questioned me—Sgt. Morales came and got me. That was on Monday morning. He came to my cell and got me.

Q. Do you have any idea what time it was Monday morning?

A. No, sir, but it was early.

Q. You say early. Did you have a watch with you, Marvin?

A. No, sir.

Q. At any time?

A. No, sir.

Q. But if you had to guess what time it was, Marvin, [fol. 166] what time would you say?

A. I would guess around 7:30, 7:30 or 8:00 o'clock.

Q. All right.

A. And maybe a little earlier.

Q. You say he came and got you.

A. Yes, sir.

Q. And what happened then?

A. Well, we stopped in his office there.

Q. All right, and did he question you some more?

A. Yes, sir.

Q. For how long?

A. It wasn't long; about fifteen or twenty minutes that time.

Q. All right, what happened after that?

A. Well, we went downstairs.

Q. All right. When you went downstairs then, what did he do?

A. We went ont to his car and got in his car.

Q. Who is "we" now? Was it just and Sgt. Morales, or anybody else?

A. It was me and Sgt. Morales and two more officers.

Q. Two more officers.

A. Yes, sir.

Q. All right. Now, did they take you out to give you a [fol. 167] polygraph test?

A. No, sir.

Q. Where did they take you?

A. They taken me out to the spot where he said he found the body at.

Q. All right, and what happened when you got out there?

A. Well, when we got out there, we got out of the car and Sgt. Morales walked down a little trail. It looked like where somebody had been traveling.

Q. All right, did you follow him along there?

A. Yes, sir.

Q. And did you get to the spot where there was a hole or anything like that?

A. No, sir, he stopped just before he got to it and told me to keep going.

Q. All right, and then did you keep going?

A. Yes, sir.

Q. And what did you follow there then?

A. I went on up to where there was a hole dug in the ground, and I stopped there.

Q. All right, were you following any kind of a trail when you did that?

A. Yes, sir.

Q. Just followed the trail on.

[fol. 168] A. Yes, sir.

Q. All right. Now, what happened there? Anything?

A. He asked me did I know what that was. I told him I guessed that was where he found the body at.

Q. All right. Had they told you that was where they were going while you were going out there?

A. No, sir.

Q. All right, but you had known, of course, from your conversation with Mr. Kirksey that they had found the body and they had told you previously. Is that right?

A. Yes, sir.

Q. All right, and how long did you stay out there that time?

A. We didn't stay out there very long. It couldn't have been over twenty minutes, twenty to thirty minutes.

Q. All right. Did they talk to you while you were out there, or what?

A. Yes, sir.

Q. What did they say?

A. Sgt. Morales, he asked me had I ever been to that spot before.

Q. All right, your answer?

A. I told him no, sir.

Q. All right, and did they question you some more about [fol. 169] the circumstances without going into them at this time?

A. Yes, sir.

Q. All right. Now, then, did they bring you back to the police station after that, or the county jail or somewhere?

A. No, sir.

Q. Where did they take you?

A. Well, we came back to—I believe they call it the Public Safety Building out on Big Spring Street out there.

Q. All right, and what did you do when you got there?

A. They carried me inside.

Q. And where did you go when you got inside?

A. Went back in an office back there.

Q. And who was present at that time?

A. It was a large fellow in there, back there in the office. I believe they called him Reed or something like that.

Q. And what happened then after that?

A. Well, they questioned me for awhile down there.

Q. Who did?

A. Sgt. Morales did.

Q. All right, and what happened after that?

A. Well, this big fellow that was in there, he started talking to me and explaining something to me.

Q. Well, how long did you stay out there, Marvin?

A. I stayed out there all day.

[fol. 170] Q. All day long?

A. Yes, sir.

Q. Marvin, did you have anything to eat Sunday night?

A. No, sir.

Q. Did you have anything to eat all day Sunday?

A. No, sir.

Q. Had anybody offered you anything to eat?

A. No, sir.

Q. Did you have anything to drink other than water?

A. No, sir, nothing but water.

Q. Now did you have any breakfast Monday morning?
A. No, sir.
Q. Before you left the jail.
A. No, sir.
Q. Did they bring you any breakfast?
A. No, sir.
Q. Did anybody ask you if you wanted any?
A. No, sir.
Q. Now during the time that you were out there Tuesday, did you have anything to eat?
A. Well, I had some milk later on Tuesday, late in the evening.
Q. Was that before or after you had signed these statements?
[fol. 171] A. That was after I had signed it.
Q. Did you have anything at noon?
A. No, sir.
Q. All right. Now, Marvin, of course you did take a polygraph test out there, didn't you?
A. Yes, sir.
Q. Just one?
A. Two.
Q. They gave you two?
A. Yes, sir.
Q. And did that consume a good long period of time?
A. Yes, sir.
Q. How long?
A. Oh, from two to three hours.
Q. For both of them?
A. Yes, sir.
Q. Now, were they asking you question, of course, during those tests?
A. Yes, sir.
Q. All right. Now, when did you complete those, if you have any idea?
A. I don't know, sir, exactly, but it must have been getting pretty close around twelve o'clock or eleven or twelve, anyway.
[fol. 172] Q. All right. Now, then, after that time, Marvin —you say they kept you out there the rest of the day?
A. Yes, sir.
Q. And continued to question you?

A. Yes, sir.

Q. Now, Marvin, did anybody threaten you during that period of time?

A. Yes, sir.

Q. Who?

A. Ranger Woods.

Q. All right, who else?

A. Sgt. Morales.

Q. Anybody else?

A. Yes, sir.

Q. Who?

A. The fellow who was giving the polygraph test.

Q. All right. Now, what did they tell you that they were going to do, if anything?

A. Am I allowed to say that here?

Q. What did Ranger Wood say to you?

A. He said if I didn't confess they were going to take me out to the grave and beat my black ass until I couldn't sit down.

Q. Did Ranger Wood hit you or anything like that?

[fol. 173] A. No, sir, not at that time.

Q. Did he make any motions as if to hit you, or anything else?

A. He drawed back on me.

Q. Did he threaten you or say anything else to you?

A. Yes, he said he would turn my black ass wrong side out.

Q. Did he call you any names?

A. Yes, "black son-of-a-bitch."

Q. What did he say when he called you that?

A. He said didn't I believe.

Q. Believe what?

A. He would turn my black ass wrong side out.

Q. How long did Ranger Wood talk to you after that?

A. After that he didn't question me and left out.

Q. Did he say anything else while in there?

A. He said he was going out and when he came back he wanted me to sign the confession.

Q. Was that what he was trying to get you to do all the time, sign a confession?

A. Yes.

Q. You told the Court that you were threatened with physical violence by Ranger Wood. Is that correct?

A. Yes, sir.

[fol. 174] Q. Were you threatened or abused by anybody else while you were out there?

A. Yes, sir.

Q. By who?

A. Sgt. Morales.

Q. Now that is the same Sgt. Morales who had questioned you intermittently all day Sunday and Sunday night——

A. Yes, sir.

Q. —and part of Monday.

Mr. Smith: Monday?

Mr. Legg: Monday. I think the record shows it, but——

Q. We are still talking about Monday while you were out at the Department of Public Safety. Is that right?

A. Yes, sir.

Q. When these things occurred, Marvin, do you know what time of day it was? Was it morning, afternoon, night, or when?

A. Well, it was in the afternoon.

Q. In the afternoon?

A. Yes.

Q. All right. Now, did Sgt. Morales interrogate or question you for a long period of time that day?

A. Yes, sir.

[fol. 175] Q. And what did he say to you with reference to any threats or coercion—I don't know whether you know what that means—with reference to any threats or anything else he might have done?

A. Well, he said he knowed I killed my wife and to confess.

Q. He wanted you to confess?

A. Yes, sir.

Q. All right. Now, did he make any threats at all against you if you didn't do that?

A. Yes, sir.

Q. What did he say?

A. Well, he said, "Come on and confess, you black son-of-a-bitch, you. We know you killed your wife," and he slapped me.

Q. He slapped you?
A. Yes, sir.
Q. Where?
A. Up side the head.
Q. All right, and did he say anything about what he might do to you if you didn't go on and confess?
A. Yes, sir.
Q. What did he say?
A. Well, he said I wasn't leaving there until they got [fol. 176] what they wanted.
Q. Said you weren't leaving there until they got what they wanted.
A. Yes, sir.
Q. All right. Now, did anybody else talk to you that day?
A. Yes, sir.
Q. Who?
A. This polygraph operator.
Q. All right, the one you referred to a little while ago. Now this is in the afternoon still, after Sgt. Morales and Ranger Wood talked to you. Is that right?
A. Yes, sir.
Q. All right, and how long did the polygraph operator talk to you, if you remember?
A. Well, I don't remember, but it seems like a long time to me.
Q. All right, and did he question you about this?
A. Yes, sir.
Q. What kind of questions did he ask you?
A. He said that they knowed that I killed my wife and that I was going to confess one way or another.
Q. That you were what?
A. They said that they knowed I killed my wife and I was [fol. 177] going to confess one way or another.
Q. All right. Were they all talking about different things or asking you the same thing, or what?
A. Well, no, sir, they would ask some questions different but they would get back on the same thing about signing a statement.
Q. All right. Now, Marvin, did you finally sign such a statement?
A. Yes, sir, later on.
Q. Do you remember when?

A. Well, not by time, but I signed it that evening.

Q. Was it before dark?

A. Yes, sir.

Q. Pretty late in the evening?

A. Yes, sir.

Q. Now why did you sign that statement out there, Marvin? Did they—who did you tell that you'd sign the statement?

A. Well, I was tired and I was hungry.

Q. You were hungry.

A. Yes, sir.

Q. Had you asked them to give you any food or bring you anything?

A. Well, I asked this polygraph operator the last time he was in there and just before I signed the statement.

[fol. 178] Q. What did you tell him?

A. I asked him would he get me something to eat or some milk, one.

Q. What did he say?

A. He said, "Sign the confession and you can have some milk."

Q. What did you say then?

A. I still refused.

Q. All right, when did you finally agree to sign—I don't mean when with reference to point of time, but when you finally agreed to sign the statement—did they bring you any milk or did you say anything about some milk?

A. Well, yes, sir, after I signed the statement they brought the milk.

Q. They brought you some milk then.

A. Yes, sir.

Q. Well, did you make a statement to them, Marvin, that you would sign a statement if they would bring you some milk?

A. Yes, sir.

Q. All right, and when was that?

A. That was after that polygraph operator hit me.

Q. All right, and did you tell him that you would?

A. Yes, sir.

Q. All right. Now, what happened after you signed that [fol. 179] statement and they gave you the milk?

A. Well, after that they typed it up.

Q. They typed it up?
A. Yes, after that.
Q. After you gave it.
A. After I gave it to them.
Q. All right, and then did you sign it?
A. Yes, sir.
Q. Who typed it up? Do you know?
A. No, not exactly, but I think it is the same officer that—it was one of the officers that typed it.
Q. All right. Now then, did you stay out there after that, or did you go somewhere else?
A. They brought me back to the courthouse, over here at the courthouse.
Q. All right, and where did they take you in the courthouse?
A. They taken me down in the basement down there.
Q. What happened down there?
A. Well, I don't know; signed some papers and read something off. I didn't understand it. They said they was charging me with murder with malice, or something, the way they had it.
Q. Do you remember whether or not the Justice of the [fol. 180] peace said anything to you—incidentally, was that a justice of the peace down there?
A. I guess so; I don't know him.
Q. Well, anyway, the man in charge of it, did he say anything to you about whether or not you wanted to waive an examining trial, or anything like that, or do you remember?
A. No, sir, I don't remember if he did. He might have said it, but I don't remember that.
Q. All right, and what happened then after that?
A. Well, after that—he did say something about setting a bond and asked me did I want him to set it and I think, but I'm not sure, I said yes, but anyway they made a bond out.
Q. Now, Marvin, in that statement that you made out there, did you say anything about how your wife met her death?
A. Yes, sir.
Q. How did you say it happened?
A. Well, I said we had an argument and she got her pistol

off the seat to shoot me, and I stopped and we started tussling over the gun, and the gun went off and we fell out the door of the truck.

Q. Now had anybody suggested to you that your wife had been shot?

A. Well, Sgt. Morales asked me did I kill her, did I shoot her. That was that Sunday.

[fol. 181] Q. All right, is that what you thought they wanted to know?

A. Well, the way he kept talking, I thought that was the way she died, she was shot.

Q. Now then, Marvin, was the statement you gave them out there true?

A. No, sir.

Q. Why did you sign that statement out there, Marvin?

A. Well, I was scared and I was sick and I was hungry, and I just felt I couldn't take no more.

Q. All right. Now then, after you left the courthouse, where did they take you or what did they do?

A. They carried me back over to the city jail over there.

Q. And did you go to bed then?

A. No, sir.

Q. What happened?

A. Well, first they let me make a telephone call.

Q. Who did you call?

A. I tried to call Elizabeth Johnson.

Q. You couldn't get her?

A. No.

Q. Did you call anybody else?

A. No, sir.

Q. All right. Now, did you ask to make a telephone call [fol. 182] before that time?

A. Yes, sir.

Q. Had they let you make any telephone calls?

A. No, sir, not before that.

Q. All right. All day Monday had you seen anybody that you knew other than the officers?

A. No, sir.

Q. Now then, the next day, or—go ahead. After the telephone call Monday night.

A. Well, they carried me back upstairs to my cell.

Q. Was it still daylight or was it dark by then?

A. It was dark then.

Q. All right. Now, did you stay in your cell then the rest of the night?

A. No, sir.

Q. Did they come back and get you?

A. Yes, sir.

Q. When?

A. Oh, I don't know exactly when, but I stayed in my cell a couple of hours.

Q. Did you get any sleep?

A. No, sir.

Q. Where did they take you, if anywhere, when they came back?

[fol. 183] A. We went back to the same office there. I guess it was Sgt. Morales' office. He was in it all the time.

Q. During the time—going back a minute, Marvin, during the time you were down in the courthouse, were the officers present at all times?

A. Yes, sir.

Q. Now when you went back, when they took you in that office, what happened? What did they say to you?

A. They said that they thought that I killed my wife, but that wasn't the way she died.

Q. They don't believe she died—"I don't believe that's the way she died." Is that what you said?

A. I said that wasn't—well, he didn't say the way she died. He said that wasn't the way that I killed her.

Q. All right. Now then, how long did they talk to you then? Who was it, incidentally? Morales?

A. Yeah, he was the one that started out.

Q. All right, and how long did he talk to you?

A. Oh, he talked to me a long time. About—I would just have to guess at it. I would say it was anywhere from an hour to an hour and forty-five minutes.

Q. All right, and then did they take you back to the cell?

A. No, sir.

[fol. 184] Q. They question you some more?

A. Yes, sir.

Q. Who questioned you?

A. Well, it was a tall, dark-headed guy, dark hair.

Q. Was he the only one that questioned you that night?

A. No, sir.

Q. Who else?

A. There was a heavy-set officer that smoked a pipe.

Q. He questioned you some?

A. Yes, sir.

Q. And did you get to bed that night?

A. Well, I got back to my cell that night.

Q. What time?

A. It was over into the night. I don't know what time it were.

Q. Now when you say "over into the night," Marvin, what do you mean? Was it before or after midnight, or what?

A. It was after midnight.

Q. Very long after midnight?

A. I would say it was; I would say it was about three o'clock, anyway. Might not have been that late. I would make a guess around three o'clock.

Q. Well, what were they trying to get you to do then, Marvin?

[fol. 185] A. Well, they said they knowed that I had lied in my statement and that wasn't the way I killed my wife, and they wanted me to tell just how it happened.

Q. Well, did those officers, any of them that night, did they threaten you or abuse you in any way?

A. No, sir, not that night.

Q. All right. Now, you say you went back to your cell probably about three o'clock in the morning, something like that.

A. Sir?

Q. Are you saying that you went back to your cell somewhere around three o'clock in the morning?

A. Yes, sir.

Q. All right, and did you spend the rest of the night in there?

A. Yes, sir.

Q. And what happened the next morning, if anything? Did they question you some more? Tuesday morning?

A. Tuesday? Yes, sir. Sgt. Morales came and got me early that Tuesday morning.

Q. Where did he take you?

A. He taken me in there in his office.

Q. Did he talk to you some more?

A. Well, it was another officer. Somebody was in there [fol. 186] and he talked to me.

Q. How long did he talk to you?

A. He didn't talk to me very long.

Q. All right, and then what happened? Did they put you back in your cell?

A. No, sir, they didn't. After that Sgt. Morales started questioning me.

Q. All right, and how long did he talk to you?

A. Oh, I don't know exactly, but he questioned me for quite a while.

Q. Now, Marvin, had you had something to eat Tuesday morning?

A. No, sir, not then.

Q. Did you at any time Tuesday morning?

A. Yes, sir, they brought me something to eat later on Tuesday morning.

Q. Was that the first thing you had to eat now except for that milk since Saturday night?

A. Yes, sir.

Q. All right. Now I believe you said you drove from Borger Saturday night after you had worked all day and reported into the sheriff's office, and they talked to you for a while.

A. Yes, sir.

[fol. 187] Q. And until about two o'clock.

A. Yes, sir.

Q. And so you didn't get much sleep Saturday night. Is that right?

A. No, sir, I didn't.

Q. And didn't get much Sunday night.

A. No, sir.

Q. Or Monday night.

A. No, sir.

Q. Now, Marvin, without going into the details of it at this time, did they question you some more Tuesday?

A. Yes, sir.

Q. Did they question you some Tuesday night?

A. Yes, sir.

Q. Did they question you Wednesday?

A. Well, no, sir, they didn't question me Wednesday.

Q. They didn't question you Wednesday?

A. No, sir.

Q. All right. Did they question you then Thursday?

A. Yes, sir.

Q. And what did you do Thursday?

A. Well, Thursday morning we left, and Sgt. Morales came up there to my cell and got me and we went out there to his—well, it wasn't his car; it was Ranger Wood's car, [fol. 188] and we got in the car.

Q. Where did you go?

A. Well, we first went out to this public safety building.

Q. All right, did you stay there any length of time?

A. No, sir, they stayed there a little while, and some other fellow came out and got in the car.

Q. All right, and then where did you go?

A. We went to Borger.

Q. Went to Borger?

A. Yes, sir.

Q. All right, and then did you stay there all of that day?

A. Where? Borger?

Q. Yes, sir.

A. No, sir, we didn't stay in Borger all that day.

Q. Do you know when you got there with reference to time?

A. No, sir, I sure don't.

Q. When you rode up there, you say Ranger Wood was driving?

A. Yes, sir.

Q. Where were you sitting?

A. In the back.

Q. Who with?

A. Sgt. Morales.

[fol. 189] Q. Did they have handcuffs on you?

A. No, sir.

Q. All right. Now, did Sgt. Morales question you any on the way up there?

A. Yes, sir.

Q. When you got to Borger, Marvin, what did you do?

A. Well, when we got to Borger, the first thing we done he wanted to know about my truck, whether it was on the job or where.

Q. All right. Is that what they were looking for, your truck?

A. Yes, sir.

Q. All right, did you show them where it was or tell them where it was?

A. Well, I told them I could take them by the job. I didn't know whether it was on the job or not.

Q. All right, and did you do that?

A. Yes, sir.

Q. Did you ever give them any consent or permission to go into or search the truck?

A. No, sir.

Q. Do you know whether they did or not?

A. Whether they searched it?

Q. Yes.

[fol. 190] A. Yes, sir, they searched it.

Q. All right. Now then, Marvin, that day did you eat lunch anywhere? Did they buy lunch for you?

A. No, sir.

Q. Did you have anything at all to eat at noon that day?

A. Well, one of the police officers at Borger bought me some milk.

Q. Bought you some milk?

A. Yes, sir.

Q. All right. After that then, did you come on back to Midland?

A. Well, yes, sir, after they got through looking in the truck we came back.

Q. All right, and what time did you get here, if you know?

A. Well, I don't know exactly what time it was, but it was over in the evening.

Q. Still daylight?

A. Yes, sir.

Q. All right. Were you in Borger at noon?

A. Yes, sir, we were at Borger around noon.

Q. All right, and when you got back did they bring you back to the police station?

A. No, sir.

[fol. 191] Q. Where did they take you?

A. We stopped back at the public safety building there on Big Spring Street.

Q. Is that the same place where you had been out there

on Monday when they were questioning you and when they threatened you?

A. Yes, sir.

Q. And hit you, and so forth?

A. Yes, sir.

Q. All right, and what happened then when you got there?

A. Well, when we got there this polygraph operator taken me back there in the room where they gave those polygraph tests.

Q. He took you back into the polygraph room?

A. Yes, sir.

Q. Did he give you another polygraph test?

A. Yes, sir.

Q. A third one?

A. Yes, sir.

Q. Did you sign any consent or agreement to any such test?

A. Well, no, sir, not then. I had signed one on one Sunday, that Sunday, but I didn't sign nothing then.

Q. You didn't sign any more after that?

A. No, sir.

[fol. 192] Q. How long did he stay in there with you?

A. He stayed in there for, oh, going on two hours. It might not have been two hours, but it was close to two hours.

Q. This third time on Thursday when you were out there.

A. Yes, sir. It seemed—I don't know if it was two hours, but it seemed to me like a long time.

Q. Did you answer his questions then that day?

A. No, sir.

Q. Did you object to taking the test then?

A. Yes, sir.

Q. They made you take it anyway?

A. Sir? Yes, sir.

Q. They made you take it anyway?

A. Yes, sir.

Q. All right. Now, were you questioned on the way back from Borger?

A. Yes, sir.

Q. And were you questioned after you got out there to the Department of Public Safety?

A. Yes, sir.

Q. And by whom were you questioned out there?

A. I was first questioned after I got back out there—Sgt. Morales first questioned me for just a little while, but he didn't question me very long.

[fol. 193] Q. Now was this before or after the polygraph test?

A. That was after the polygraph test.

Q. All right. Sgt. Morales questioned you?

A. Yes, sir.

Q. Was he just questioning you or did he threaten you, or what?

A. Well, yes, sir, he kept on wanting to know something about the shoes and what they were doing in the truck.

Q. All right. Did he threaten you, though?

A. Yes, sir, he said he was losing his—he was getting impatient with me and that I better come on and play ball with them.

Q. All right, and did he threaten to do anything to you if you didn't?

A. Well, not at that time he didn't.

Q. Well, did he at any time that night?

A. Yes, sir.

Q. That was later on?

A. Yes, sir.

Q. All right. Now who talked to you after that?

A. Ranger Wood talked to me after that.

Q. And how long did he talk to you?

A. About—I don't know exactly how long. It wasn't very long because——

[fol. 194] Did Ranger Wood do anything to you?

A. No, sir, not then.

Q. All right, did he threaten to do anything to you?

A. Yes, sir.

Q. What did he say?

A. Well, he said just about the same thing he said before, that if I didn't give them a statement what they was going to do to me.

Q. All right, did he say he had ever done anything like that?

A. Sir?

Q. Did he say he had ever done anything like that?

A. Yes, sir.

Q. What did he say?

A. Well, he said he had beat a lot of black sons-of-bitches' ass like me, and asked me didn't I believe it.

Q. All right, did anybody else talk to you out there that night?

A. Yes, sir, that polygraph operator. He talked to me.

Q. All right, and did Sgt. Morales talk to you again that night after this first time that you talked about?

A. Yes, sir.

Q. All right. Well, what were they trying to get you to do, Marvin?

[fol. 195] A. Well, they wanted me to sign another confession.

Q. Why?

A. Well, they said that wasn't the way that I killed my wife and they knowed that I choked her.

Q. How did they tell you it happened?

A. Well, they said that they knowed I choked her to death.

Q. Told you that?

A. Yes, sir.

Q. And had you denied it all this time or——?

A. Yes, sir.

Q. All right. Now, did the polygraph operator—the man that you refer to as the polygraph operator—you say he talked to you again?

A. Yes, sir.

Q. And what did he tell you?

A. Well, I was sitting there in the chair and he sat over there in another chair right close to me, and he told me that he knowed I killed my wife and that I was going to give them a statement and I was going to give it to them right then.

Q. What did you tell him?

A. I told him no, sir, I didn't kill my wife.

Q. All right. Now, did anything happen while he was [fol. 196] in the room?

A. Yes, sir.

Q. What?

A. Well, I guess I might have been looking down, I don't know for sure, but, anyway, he said, "Look up at me, you

black son-of-a-bitch you," and he taken one hand and knocked my chin up and taken his other hand and slapped me in the face.

Q. All right, and did anything else happen while he was there?

A. Yes, sir.

Q. What was that?

A. He hauled away and hit me in the stomach.

Q. Hit you in the stomach.

A. Yes, sir.

Q. Very hard?

A. Yes, sir.

Q. Did it knock you in the floor?

A. Yes, sir.

Q. Did he say anything to you then?

A. He said, "Get up, you black son-of-a-bitch you." He says, "Is you mad?" I says, "No, sir." He said, "I hope you is."

Q. Now, Marvin, did you give them another statement? [fol. 197] A. Yes, sir.

Q. When?

A. I gave it to them then.

Q. Right after that?

A. Yes, sir.

Q. All right, and did you say in that statement what they told you they wanted you to say?

A. Yes, sir.

Q. And what was that?

A. I told them that, as near as I can remember, there was a belt laying in the truck behind the seat and I grabbed it, put it around her neck, and started choking her.

Q. Marvin, were you scared? Were you afraid out there that night?

A. Yes, sir.

Q. Was that statement that you gave to those officers true?

A. No, sir.

Q. Now when were you brought over to the County?

A. You mean the—brought me over here to stay?

Q. Yes.

A. That Friday.

Q. All right, and then did you make another statement?

A. Yes, sir.

[fol. 198] Q. Was that third statement true?

A. No, sir.

Q. Marvin, why did you make that third statement, the one given to—wasn't it given to Mr. Howell or Mr. Fletcher?

A. Yes, sir. Well, ——

Q. Was it given to them?

A. Sir?

Q. Did you give it to them?

A. Yes, sir.

Q. All right. Now, Marvin, why did you sign that third statement?

A. Well, I was afraid. I didn't think I could go through with the same thing I had went through for three or four more days, and I had already signed two statements, so I didn't figure it made any difference.

Q. Did they say something to you about taking another lie detector test?

A. Yes, sir, the officer that testified in here before I did, he asked me to take one.

Q. Did you want to take another lie detector test?

A. No, sir. I told him I wouldn't take narry another one.

Q. Now, Marvin, I believe you testified that you didn't feel like you could go through it another three or four [fol. 199] days again. Is that right?

A. Yes, sir.

Q. Could you see all this starting over again if you didn't sign another statement?

A. Well, yes, sir.

Q. Did you believe or didn't you that the same things would happen to you if you didn't sign another statement?

A. Yes, sir, I believed the same thing would happen.

Q. All right. Now, did Mr. Fletcher or Mr. Howell or anybody abuse you during that hour that you talked to them?

A. No, sir.

Q. All right. Did you have any reason to know whether they would or not unless you did sign a statement?

A. Well, no, sir, I didn't have any reason, but those other officers, they told me things and they backed out on

what they told me, so I didn't have any more belief about them than I did the others. They done something to me that they said they wouldn't do.

Mr. Legg: I believe that is all, unless you want to cross examine him.

Mr. Smith: Yes, I do.

[fol. 200] Cross-examination

By Mr. Smith:

Q. Now, Mr. Clewis, I would like to talk to you about the Saturday night that you returned to Midland. You know when I mean?

A. Yes, sir.

Q. And you came to the sheriff's office. Is that correct?

A. Yes, sir.

Q. Did anyone threaten you or abuse you in the sheriff's office that night?

A. No, sir.

Q. You were not afraid that night, were you, sir?

A. No, sir, not that night.

Q. You were not scared.

A. No, sir.

Q. All right. No one tried to get you to make a confession that night, did they?

A. No, sir, they didn't try to make me make a confession, but he did ask me if I would take a polygraph test.

Q. Did anyone try to get you to sign a confession that night?

A. No, sir.

Q. And then you went on home from the sheriff's depart-

[fol. 201] ment. Is that correct?

A. Yes, sir.

Q. And you say you got home around 2:00 o'clock A.M., something like that?

A. Yes, sir, somewhere along there.

Q. You had a good night's sleep then that night?

A. Well, I wouldn't say it was a good night's sleep, but I slept the rest of the night.

Q. Until what time?

A. Until around 6:30 that morning.

Q. All right. Is that when officer Morales came to your house?

A. Yes, sir.

Q. He introduced himself as officer Morales, didn't he, sir?

A. Well, he said that he was an officer.

Q. Yes.

A. Morales.

Q. You knew he was a police officer.

A. No, sir, I didn't know whether he was a police officer or out of the sheriff's department, because——

Q. I see. You just thought he was a peace officer.

A. Yes, sir.

Q. O.K. Did you eat any breakfast there at the house [fol. 202] that morning?

A. No, sir.

Q. All right. You went with him then.

A. Yes, sir.

Q. Where did you all go, please? Police department?

A. Yes, sir.

Q. How long did he talk to you at the police department at one time? The first time he talked to you, how long did he talk to you?

A. I would say an hour or hour and a half, somewhere along in there.

Q. All right, sir. Didn't Mr. Morales offer you coffee and rolls at the police department that morning?

A. No, sir.

Q. What did he do after he talked to you for that hour or hour and a half? Put you back in the cell?

A. No, sir, not at that time he didn't.

Q. He didn't threaten you during that time, did he?

A. No, sir.

Q. Didn't abuse you in any way, did he?

A. No, sir.

Q. He wasn't trying to get you to sign a confession at that time, was he, sir?

A. Well, he wanted me to admit that I killed my wife. [fol. 203] I don't know whether that means signing a confession or not.

Q. I see. All right, now you say he talked to you for

an hour or an hour and a half, and he did not put you back in a cell. What did happen, please, sir?

A. There was another officer questioned me.

Q. All right, who was that other officer?

A. Well, I don't know the officer when I see him—I mean, by name, but I know him when I see him.

Q. Have you seen him around the courthouse today?

A. Around the courthouse today?

Q. Yes, sir.

A. Yes, sir.

Q. Can you describe him? What I am trying to find out is who he was, Mr. Clewis. That is what we are trying to do, trying to identify the officer.

Mr. Legg: Your Honor, I believe he did that on Direct.

Q. Is he the one you said had the knot on the side of his head?

A. No, sir. I think he is the guy who has got the black hair, the tall fellow with black hair.

Q. All right, how long did that fellow talk to you?

A. Well, just like I said before, I'm only guessing at the time because I didn't have a watch.

[fol. 204] Q. All right, sir.

A. But he questioned me anywhere from an hour to two hours between the same time that Sgt. Morales had.

Q. And then what happened? Did Morales talk to you some more or did that officer talk to you some more or some other officer talk to you, or did you just go to a cell, or what?

A. Well, they carried me to a cell for awhile.

Q. Who took you to the cell, please, sir?

A. Sgt. Morales took me to the cell first.

Q. I beg your pardon?

A. Sgt. Morales.

Q. All right? He took you to the cell. You were put in a cell.

A. Yes, sir.

Q. All right, how long did you stay in the cell, please?

A. I don't know; I would say an hour, maybe not that long or maybe longer.

Q. Did anybody bother you while you were in the cell?

A. No, sir.

Q. You had water in there, didn't you?

A. Yes, sir.

Q. Rest-room facilities?

A. Yes, sir.

Q. All right, what happened next? What was the next step?

[fol. 205] A. They came and got me again.

Q. Who was it, please, sir, who came after you?

A. Well, now, I think it was Sgt. Morales and an officer with a uniform on.

Q. I see. Where did they take you, please?

A. Well, the officer with the uniform on, he just—he didn't take me any place. Me and Sgt. Morales went on back down to his office there. I guess this other officer, after he opened the door and things, why, I don't know where he went.

Q. You and Morales went down to Morales' office, you say?

A. Yes, sir.

Q. All right, what happened, please?

A. Well, he started questioning me again.

Q. Was there anyone else present except you and Morales?

A. No, sir, not while he was questioning me.

Q. How long did he question you, please, sir?

A. I don't know, sir; I would still have to guess and say an hour or two hours.

Q. Was this afternoon or morning, or do you know, Sunday?

A. No, sir, I don't know for sure.

Q. Did he threaten you in any way this time?

[fol. 206] A. No, sir.

Q. Didn't abuse you in any way whatsoever?

A. No, sir.

Q. He wasn't trying to get you to sign a confession?

A. Well, he was trying to get me to confess and also take a polygraph test.

Q. Were you offered food in the afternoon?

A. What day was this?

Q. This would be Sunday.

A. No, sir.

Q. You weren't offered any food

A. No, sir.
Q. Did you have any visitors?
A. Sunday?
Q. Sunday.
A. Yes, sir.
Q. Who were they?
A. Well, my mother-in-law, she visited me.
Q. All right, anyone else?
A. And my sister, and Elizabeth Johnson.
Q. All right, your mother-in-law, your sister, and Elizabeth Johnson.
A. Yes, sir.
Q. They visited with you. Is that correct?
[fol. 207] A. Yes, sir.
Q. Did they visit with you alone some? By yourself?
A. No, sir, I wasn't by myself.
Q. Always officers present?
A. Yes, sir.
Q. Now, did you say they questioned you Sunday night, also?
A. Yes, sir.
Q. And who did the questioning on Sunday night, please?
A. Well, it was Sgt. Morales. He is the one I know by name.
Q. All right.
A. And the follow who smokes a pipe.
Q. All right. A big fellow?
A. Yes, sir.
Q. Would that be Herman Wicker?
A. I don't know.
Q. You don't know?
A. No, I don't know his name.
Q. How long did they question you, sir? We are talking about Sunday night now.
A. Well, the—I don't know how long a time, but they questioned me anywhere from an hour or hour and a half to two hours, each one of them.
[fol. 208] Q. I see. Was it past midnight?
A. Well, it was past midnight when they carried me back to my cell.
Q. And were they questioning you all this time?
A. Yes, sir. Oh, sometimes it may be five or ten min-

utes they wouldn't say anything. They'd just sit there and look at me.

Q. I see. Were you threatened in any way during this period of time?

A. No, sir.

Q. And is it correct to say you think they locked you up around 2 A.M.? That would be past midnight, 2:00 A.M.

A. Well, I wouldn't say it is correct and I wouldn't say it was *un*correct because I didn't have any way to tell.

Q. Well,—I'm not trying to trick you now, but tell me—I think it is what you told us awhile ago. It was past midnight. Is that right?

A. Yes, sir, I would say it was past midnight.

Q. And if you said 2:00 A.M. awhile ago, that is your best guess at it. Is that right?

A. Yes, sir.

Q. All right. Then you were left alone until Monday morning. Is that correct?

A. Yes, sir.

[fol. 209] Q. From 2:00 A.M. until, I believe you said 7:30 or 8:00 or 8:30, or something like that?

A. Well, I was still guessing at the time. It could have been earlier and it could have been later.

Q. It was daylight, wasn't it?

A. Yes, sir, it was daylight.

Q. You were allowed to rest, you were left alone then from approximately 2:00 A.M. Monday morning until 7:30 or 8:00 or 8:30 Monday morning. Is that right?

A. Well, I don't know what time it was.

Q. All right, sir, but you were left alone, anyhow, until they came after you. Is that correct?

A. Yes, until Monday morning.

Q. And were you offered any breakfast that morning?

A. That Monday morning?

Q. Of coffee and rolls?

A. No, sir.

Q. Yes, Monday morning.

A. No, sir.

Q. All right, and you went out to the grave with Sgt. Morales and two other officers, and do you know who the two other officers were?

A. Well, one of them was—I know one of them by the guy I was telling you about that had this—it looked like [fol. 210] a knot or wen on his forehead up here.

Q. Did they abuse you on the way out to the grave in any way?

A. No, sir, not on the way out there.

Q. Didn't threaten you or anything of that nature?

A. No, sir.

Q. Were they trying to get you to sign a confession going out to the grave?

A. Well, they didn't say anything about signing a confession, but they just told me to confess. They didn't say anything about signing it then.

Q. All right, and you were out at the grave anywhere from twenty to thirty minutes, you said, and there were no threats out there?

A. No, sir.

Q. All right, no abuse of any kind.

A. No, sir.

Q. And you came back, and where was it they brought you back to, please?

A. I think they call it the Public Safety Building, or something.

Q. That lie detector place.

A. Yes, sir.

Q. All right, they didn't take you back to the city jail?

[fol. 211] A. No, sir.

Q. You didn't go back there and change clothes on that Monday morning?

A. Was that——

Q. That Monday—excuse me, I am talking too fast for you. Did you go back to the city jail that Monday morning and change clothes before you went to the DPS, the lie detector place?

A. I don't remember, but it kind of seems to me like I did. It seems to me like they carried me back in a room and I changed clothes, but I don't remember that.

Q. O.K. Now you are out at the DPS, and did you sign the—I am talking about Sunday now—did you sign the permission to take the polygraph test?

A. Yes, sir.

Q. Sunday?

A. Yes, sir.

Q. You weren't threatened in any way to sign that, were you, sir?

A. No, sir, I wasn't threatened.

Q. Or forced in any way to sign that?

A. Well, I wasn't forced, but I was talked into it.

Q. Were you scared?

A. Scared, what by?

[fol. 212] Q. I am talking about signing the permission to take the polygraph thing now.

A. Well, no, sir, I wasn't scared.

Q. All right, and I believe you say you didn't have any breakfast on Monday morning and nobody offered you any. Is that right?

A. Yes, sir.

Q. Monday morning I am talking about. All right. How long were you in the polygraph room Monday morning?

A. I would say from two to three hours.

Q. All right, sir, and who questioned you that Monday morning?

A. You mean——

Q. Who were the officers who questioned you, if anybody did?

A. Well, Sgt. Morales. He questioned me.

Q. All right, anyone else?

A. That Monday morning?

Q. Yes.

A. Ranger Wood. He questioned me.

Q. All right, sir. Anybody else? Monday morning.

A. Well, the polygraph operator.

Q. All right. So Morales, Wood and Reed, on Monday morning. Right?

[fol. 213] A. Yes, sir.

Q. Anyone else?

A. Well, I don't remember whether there was anyone else or not, but I know this same fellow I was talking about was out there. I don't remember whether he——

Q. The one with the knot on his head?

A. Yes, sir.

Q. Did he question you any that morning?

A. Well, now, I am not positive about that. He might have did.

Q. Did he abuse you that morning, the man with the knot on his head? Threaten or abuse you in any way?

A. No, sir.

Q. O.K. Did Wood abuse you in any way that morning, Monday morning?

A. Monday morning?

Q. Uh huh, Monday, Monday morning.

A. Well, I don't know if it was Monday morning or Monday afternoon.

Q. I see.

A. When he——

Q. Mr. Wood abused you sometime Monday and you don't know what time Monday. Is that correct?

A. No, sah.

[fol. 214] Q. All right. What about the polygraph operator, Reed. Did he abuse you on Monday?

A. Yes, sir.

Q. You know when it was on Monday?

A. Well, it was done around the same time Ranger Wood did.

Q. It could have been morning or afternoon, you just don't know.

A. Yes, sir. Not for sure, I don't.

Q. All right, did Wood threaten you or abuse you more than once on Monday?

A. Yes, sir.

Q. How many times, please?

A. Well, I would say two, maybe three; I don't remember exactly.

Q. Did Reed abuse you more than once on Monday—the polygraph operator?

A. Yes, sir.

Q. How many times, please?

A. Well, I don't remember. It may have been two times. I know it was as much as two times.

Q. Were those threats or what? What kind of abuse was it, please, that Mr. Wood and Mr. Reed put on you?

A. Well, I would call them threats.

[fol. 215] Q. Threats.

A. Yes, sir.

Q. Like you were whispering to us up there awhile ago?

A. Yes, sir.

Q. What about Morales? Did he abuse you in any way?
A. Yes, sir.
Q. How many times?
A. Well, I would say about twice or maybe three times; I don't know for sure.
Q. These were threats. Is that right?
A. Yes, sir.
Q. Did Morales strike you or hit you in any way on this Monday?
A. Yes, sir.
Q. He hit you on Monday?
A. Yes, sir.
Q. You know whether it was Monday morning or Monday afternoon?
A. No, sir, I couldn't say if it was Monday morning or Monday afternoon.
Q. You know how many times he struck you?
A. One time.
Q. All right, did Reed strike you any on this Monday? This polygraph operator, did he hit you any on Monday?
[fol. 216] A. Yes, sir.
Q. How many times?
A. I don't remember on Monday how many times. It was one or two, or two or three times.
Q. All right, did Wood hit you or strike you any on Monday?
A. Ranger Wood?
Q. Yes, sir.
A. No, sir.
Q. Did you rest any while you were in there on Monday. Did they give you a chance to rest?
A. Well, no, sir, I wouldn't—well, yeah, let's see. I did—they did lock me up back there in the office for awhile while they were back there talking, but it wasn't long enough to call it a rest.
Q. All right, did they offer you any food on Monday?
A. No, sir.
Q. The periods of time were long periods of time that they questioned you. Is that correct?
A. Yes, sir.
Q. It wasn't just ten or fifteen minutes at a time.
A. No, sir.

Q. How long would you say, your best estimate, the periods of time?

[fol. 217] A. Well, I could only make a guess. Like I said, sometimes it seemed like it was an hour or hour and a half and sometimes it would seem like it was longer.

Q. All right. Was there anyone else on Monday at the DPS, Department of Public Safety, besides Wood, Morales, Reed, who abused you in any way?

A. No, sir.

Q. This man with the knot on his head didn't abuse you in any way out there. Is that right?

A. No, sah.

Q. No one else abused you. Just those three.

A. Yes, sir.

Q. All right. Now, you left the DPS, you left the polygraph place—you know what I mean when I say "DPS"?

A. Yes, sir.

Q. You know what I mean?

A. Yes, sir.

Q. All right, sir.

(The hearing on Defendant's Motion was here recessed until 7:00 o'clock P.M., at which hour the hearing was resumed and the questioning of the defendant, Marvin Clewis, continued on Cross Examination by Mr. Smith.)

Q. For the record, you are Marvin Clewis, the defendant.

[fol. 218] A. Yes, sir.

Q. I am referring now to Monday, the day you have been testifying about.

A. Yes, sir.

Q. Who was it that told you something like that you could not leave until they got what they wanted? Who was it that told you that?

A. The polygraph operator.

Q. And you were at the DPS, Department of Public Safety, most of Monday afternoon. Is that what you said when you were talking to Mr. Legg on Direct?

A. Yes, sir.

Q. All right, do you have any idea when you left the Department of Public Safety on Monday afternoon?

A. No, sir, I sure don't.

Q. And where was it you went when you left the Department of Public Safety? Where was it they took you?

A. They brought me to the courthouse.

Q. To the courthouse.

A. Yes, sir.

Q. That was downstairs to the basement.

A. Yes, sir.

Q. And the justice of the peace or the judge or the man in charge down there could have—he could have asked you [fol. 219] about the examining trial, about things of that nature. You are just not sure.

A. Well, he could have, but just like I say, I am not sure.

Q. You are not saying he didn't do it; you are not saying he did. You just don't know. Is that right?

A. Yes, sir, that's right.

Q. Did they abuse you downstairs in any way?

A. You mean——

Q. ——here in the courthouse?

A. No, sir.

Q. All right, there was no abuse of any kind down there then.

A. No, sir.

Q. All right. Now where did they take you next?

A. They carried me back over to the city jail.

Q. All right, sir, and of course they offered you some food after they got you back over at the city jail, didn't they?

A. Was that that Monday night?

Q. Yes, sir.

A. No, sir.

Q. You had no food on Monday night?

A. No, sir.

[fol. 220] Q. Now then, they took you from the justice of the peace office here in the courthouse over to the city jail.

A. Yes, sir.

Q. And did they go on and put you in a cell over at the city jail, or did they question you some more, or what?

A. Well, they questioned me some more.

Q. You know who it was, please, sir?

A. Well, I believe it was Sgt. Morales.

Q. All right, sir. Now it was at the city jail on Monday night that you used the telephone. Is that correct?

A. Well, yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And you were talking to Elizabeth Johnson.

A. Yes, sir. I called her but she wasn't at home.

Q. Oh, I see. They did let you use the telephone then on Monday night.

A. Yes, sir.

Q. Now you said when you were talking to Mr. Legg that you had asked to use the telephone before this time. You remember? You told Mr. Legg that you had asked if you could use the phone before this particular Monday night. When was it that you had asked? Do you remember?

A. I asked to see my sister or somebody Sunday.

[fol. 221] Q. On Sunday.

A. Yes, sir.

Q. Well, you saw your sister Sunday, didn't you?

A. Yeah, but I wanted to see her before she came up there Sunday.

Q. Oh, I see. You saw her Sunday afternoon?

A. Yes, sir.

Q. And you did talk to her on Sunday afternoon.

A. Yes, sir.

Q. But you wanted to see her before she got there. Is that right?

A. That's right.

Q. All right. Now, how long did they talk to you on Monday night? You say it was Morales. Was it—excuse me, I am asking you three questions there. How long did they talk to you Monday night?

A. You mean altogether?

Q. Yes, sir.

A. Well, it was just like I said. It was after midnight.

Q. I see. All right. That is when you say it was two or three o'clock in the morning.

A. Yes, sir.

Q. All right. Who were the ones that talked to you on that Monday night? Who were the officers that talked to [fol. 222] you on that Monday night?

A. Well, one of them was Sgt. Morales.

Q. All right? Anybody else?

A. And it was that big fellow I told you that smoked a pipe.

Q. All right. Now was Morales around most of the time? When the big fellow with the pipe was around, was Morales in and out?

A. Well, he came in sometimes but he didn't stay in while he was questioning me.

Q. All right. Anybody else on Monday night?

A. And there was a dark-headed fellow.

Q. All right. Now how long at each time when Morales talked to you—how long each time did he talk to you?

A. Well,——

Q. Five or ten minutes of what?

A. It was longer than that. It was just like I said; it sometimes seemed like it was an hour and sometimes it seemed like it was more than an hour.

Q. All right, and how long did the big man with the pipe talk to you?

A. Well, I don't know exactly, but he talked to me for quite awhile.

Q. Would you say an hour?

[fol. 223] A. Oh, I would say about an hour, maybe a little longer. Guessing at the time it is a little hard to say.

Q. All right, and the dark man, how long did he talk to you?

A. Well, I really don't have no way to tell.

Q. Would you say an hour on him, less, or more?

A. I would say about an hour, maybe less.

Q. Did either Morales or the big man with the pipe or the dark-headed man, did any of them abuse you on this Monday night?

A. No, sir.

Q. No threats?

A. No, sir.

Q. No striking with the hand or anything like that?

A. No, sir.

Q. All right. Then, after you were locked up Monday night, were you left alone in a cell by yourself or were you with other people?

A. I was in a cell by myself.

Q. All right, and you had washing facilities and things like that in your cell, didn't you, sir?

A. Yes, sir.

Q. Had a place to lay down.

A. Yes, sir.

[fol. 224] Q. Nobody bothered you then until the next morning.

A. Yes, sir, that's right.

Q. Now the next morning would be Tuesday morning. Right?

A. Yes, sir.

Q. All right. What happened Tuesday to you?

A. Well, Sgt. Morales and a uniformed officer, policeman, opened the cell.

Q. Did Morales talk to you?

A. Yes, he carried me to his office there.

Q. How long, please?

A. Well, he carried me to the office. It was another fellow setting up in there.

Q. Was it a peace officer that talked to you in the office?

A. No, sir, because I don't know one peace officer from another.

Q. How long did he talk to you, whoever it was?

A. Well, he didn't talk very long. He didn't—I don't know—he just talked to me.

Q. He didn't threaten you, then, did he?

A. No, sir, didn't threaten me.

Q. Didn't talk to you very long?

A. No, sir.

Q. Didn't abuse you in any way?

[fol. 225] A. No, sir.

Q. All right, and then, after that man talked to you, what happened? Did you rest awhile, or did somebody else talk to you, or what?

A. Well, Sgt. Morales started talking to me.

Q. How long did Sgt. Morales talk to you this time?

A. I still would have to guess.

Q. All right.

A. I would guess an hour and a half, or something.

Q. All right, an hour or hour and a half. This would be Tuesday morning.

A. Yes, sir.

Q. Did he threaten you in any way on this morning?

A. No, sir.

Q. Did he strike you in any way?
A. No, sir.
Q. Did he abuse you in any way?
A. No, sir.
Q. All right, after Morales, what happened?
A. It was some other officer talked to me, but I don't remember whether it was the blond-headed guy or the big fellow. I don't just exactly remember.
Q. Did that fellow abuse you in any way?
[fol. 226] A. No, sir.
Q. Well, what about food on this date? Did you have any food on Tuesday?
A. On Tuesday?
Q. Yes.
A. Yes, sir.
Q. When was that, please, sir?
A. I don't know what time it was.
Q. Would it be breakfast, lunch or supper, or where would you put it?
A. Well, now, I don't know where you would put it, but I can tell you what it was.
Q. All right.
A. It was a roll and a potato and a slice of bologna. I don't know whether it was breakfast or what.
Q. Was it daylight or dark?
A. It was daylight.
Q. Well, was there any questioning Tuesday afternoon?
A. Yes, sir.
Q. Who did that, please, sir?
A. Well, it was just back and forward. Part of the time it would be Sgt. Morales and sometimes it would be some of the other officers. I just didn't keep track of which officer.
Q. Morales questioned you—you are sure it was Morales
[fol. 227] part of the time on Tuesday afternoon?
A. Yes, sir.
Q. The other officers you say, was it some of the officers who questioned you earlier?
A. Yes, sir.
Q. Was it the Ranger, Wood?
A. No, sir, not at the police station.
Q. Sir?
A. I said not at the police station.

Q. We are talking now about Tuesday afternoon. Well, how many meals did you get on Tuesday? How many meals did you get on Tuesday?

A. I believe one is all I got.

Q. And there was no abuse of any kind now on Tuesday.

A. No, sir.

Q. What about Tuesday night? Anybody question you Tuesday night or not?

A. Yes, sir.

Q. Who was it on Tuesday night?

A. Well, it was the big fellow that smoked a pipe.

Q. All right, anybody else?

A. Sgt. Morales.

Q. Morales on Tuesday night.

A. Yes, sir.

[fol. 228] Q. Anyone else?

A. I am not sure, but it was the dark-headed guy or this other officer with the knot on his head.

Q. All right. You mean there was a dark-headed man and also the man with the knot on his head?

A. Well, yes, sir, it was——

Q. Do you mean the dark-headed man and the man with the knot on his head is one and the same person?

A. No, it is two different people. I mean, I don't know which one of them it was that——

Q. It was one or the other?

A. Yes, sir.

Q. Did they abuse you in any way?

A. No, sir.

Q. All right, how long did the big man with the pipe question you?

A. Well, he questioned me for quite awhile.

Q. Well, would you say five or ten minutes or an hour or two or how long?

A. I would say maybe an hour, forty-five minutes or something like that.

Q. An hour and forty-five minutes or forty-five minutes or an hour?

A. Forty-five minutes or an hour.

[fol. 229] Q. Forty-five minutes or an hour.

A. Yes, sir.

Q. Is that correct? All right. How long did Morales question you on this Tuesday night?

A. I don't know, sir.

Q. Short time or long time?

A. It wasn't no real short time. I don't know exactly—— about an hour. You see, I'm just guessing at the time because I didn't see a clock or anything.

Q. All right, what about the dark-headed man? How long did he question you?

A. Well, I'm not sure whether it was the dark-headed man or the other fellow. That's the reason I say I don't know which one.

Q. All right, which ever one it was, how long did he question you Tuesday night?

A. I don't know exactly. I could guess, but it would only be guessing.

Q. It wasn't a very long time, then, I guess, was it?

A. I don't know, sir.

Q. Did they give you an opportunity to rest from time to time?

A. No, sir, not between the time they would be questioning me they didn't.

[fol. 230] Q. All right, what time did you finally get to bed on Tuesday night?

A. Oh, I don't know, sir.

Q. You suppose it was before midnight or after?

A. I suppose it was after midnight. I am not sure. It looked to me like it should have been after midnight.

Q. All right, and then you were put in your cell and left alone. Is that correct?

A. Yes, sir.

Q. Let's see if I have got this straight now. All day Tuesday you never were threatened and were never abused in any way.

A. No, sir.

Q. What about Wednesday?

A. Wednesday I don't think they questioned me at all. If they did I don't remember it.

Q. All right, no questioning on Wednesday.

A. No, sir.

Q. You were just left alone by yourself. Is that right?

A. Well, yes, sir, as near as I can remember.

Q. All right. You had food? They fed you?

A. I guess they brought me something.

Q. They treated you well in every way. Is that right?

A. Yes, sir, I suppose so.

[fol. 231] Q. O.K. You got a good night's rest on Wednesday night.

A. There wasn't nobody bothered me; I wouldn't say I got a good night's rest.

Q. You had a bed to sleep on and all that.

A. Yes, sir.

Q. I guess that brings us to Thursday then. What happened Thursday?

A. Well, Sgt. Morales came up there and got me Thursday.

Q. Excuse me, go ahead.

A. He came up there and got me Thursday.

Q. Is this the day you went to Borger?

A. Yes, sir.

Q. All right, and it was Morales and Mr. Wood. Was there anybody else with you that went to Borger?

A. Well, it was Sgt. Woods, Mr. Morales, and some other fellow.

Q. Did they threaten or abuse you on the way to Borger?

A. No, sir.

Q. Did they threaten or abuse you while you were in Borger?

A. Well, yes, sir, they—I was standing there at the truck one time and they said something, and I was trying to explain something to them about it and Ranger Wood told me—well, he told me to get my ass back over there [fol. 232] somewhere and set down and get out of the way.

Q. I see. Did he draw back at you to hit you or strike you or anything of that nature, or did he just tell you to move over there?

A. No, sir, he didn't draw back.

Q. You had a chance to visit with some of your relatives there in Borger, didn't you, sir?

A. No, sir.

Q. Did you have a chance to visit with some of your friends in Borger?

A. No, sir.

Q. On the way back from Borger, did they threaten or abuse you in any way?

A. Well, they cussed at times.

Q. Who cussed you?

A. Well, it was Sgt. Morales.

Q. All right. I don't want to embarrass anybody, but we have got to have the facts, Mr. Clewis. What did he call you?

A. I don't remember at the time because part of the time they would say something and I would try not to hear what he was saying.

Q. That was Morales that did that. Was anybody else cussing besides Morales?

[fol. 233] A. No, sir.

Q. Did he threaten to hit you or strike you or abuse you in any way?

A. Well, I don't know whether you call it strike or not. He raised his hands up once or twice.

Q. All right, this is Morales again.

A. Yes, sir.

Q. Was there any questioning going on on the way up to Borger?

A. Well, a little bit.

Q. Just a little bit.

A. Yes, sir.

Q. On the way back was there any questioning?

A. Yes, sir.

Q. Very much or just a little bit?

A. Well, Sgt. Morales did all the talking. Nobody else did. He would question me for awhile and then he would hush and start talking to the officers up there.

Q. All right. Now we get back to Midland. Where did they take you, please?

A. They taken me to this public safety building on Big Springs Street.

Q. All right, the polygraph operator talked to you out there?

[fol. 234] A. Yes, sir.

Q. You had some food in Borger, Texas, before you came back to Midland, didn't you, sir?

A. I had some milk up there.

Q. Do you know what time of day it was when you arrived back in Midland from Borger?

A. No, sir.

Q. You know whether it was dark or not?

A. No, sir, it wasn't dark.

Q. It was not dark. All right. How long were you at the DPS on this Thursday afternoon?

A. Well, I was there until night. I don't know how long it was, but I was there until night from the time we got back.

Q. When you get back, where did they take you from the DPS? Where did they take you from the DPS?

A. That Thursday night?

Q. Yes.

A. They brought me back to the city.

Q. All right, did they feed you when they got you back here?

A. No, sir.

Q. To the city?

A. No, sir.

Q. They didn't feed you?

[fol. 235] A. No, sir.

Q. Well, did you make another statement out there at the DPS on Thursday afternoon before you came back to the city?

A. Yes, sir.

Q. All right, and what did they do with you on that Thursday afternoon after they got you back to the city? Did they lock you up?

A. Yes, sir.

Q. Didn't talk to you any more that night then?

A. No, sir.

Q. No abuse, no threats, no nothing, Thursday night?

A. Not after I got back to the city.

Q. All right, sir, and then Friday they didn't ask you any questions down at the city.

A. No, sir, not as I remember.

Q. Thursday night you were left alone.

A. Yes, sir.

Q. At the city Thursday night.

A. Yes, sir.

Q. You weren't interrogated or bothered in any way Thursday night?

A. No, sir, I don't think so.

Q. You had a bed and toilet facilities and things of that nature, didn't you, sir?

[fol. 236] A. Yes, sir.

Q. Friday. Did they question you any Friday at the city?

A. No, sir, I don't believe they did. If they did I don't remember.

Q. All that happened to you Friday was that they brought you over to the county jail. Is that correct, sir?

A. Yes, sir.

Q. No abuse, no threat, none of that sort of thing——

A. No, sir.

Q. —on Friday. They treated you all right on Friday.

A. Yes, sir.

Q. O.K. Do you know who brought you over here to the county?

A. That Friday?

Q. Friday, yes, sir.

A. No, sir, I am not for sure. I know Sgt. Morales did for one and I don't know who else.

Q. Mr. Clewis, we have been talking about Friday.

A. Yes, sir.

Q. And you were brought here to the county jail.

A. Yes, sir.

Q. Now, after you were put in the county jail, you never did see the Texas Ranger any more, did you, sir?

A. No, sir, I don't believe I did.

[fol. 237] Q. And you didn't see Morales any more, did you, sir?

A. I am not sure. Seems to me like I was down taking fingerprints or something one time and I saw Sgt. Morales. I am not sure about that.

Q. You mean after you were over here at the county you saw Morales?

A. Like I says, I says I'm not sure. I says I think I did, is what I says.

Q. Did he ever ask you questions over here?

A. No, sir.

Q. If you saw him, he never had anything to do with you. Is that right?

A. That's right.

Q. But you are not sure you saw him.

A. No, sir, I'm not sure.

Q. All right, what about the polygraph operator. Did you use the polygraph operator after you came to the county?

A. No, sir.

Q. Well, did you see any of the city officers? You didn't see any of them after you came over here to the county jail, did you?

A. No, sir, I don't think I did.

Q. And, as a matter of fact, nobody, no officials, deputy sheriffs or anybody else, asked you any questions or talked [fol. 238] to you on that Friday when you were brought over here, did they? They didn't ask you any questions, did they?

A. No, sir.

Q. Didn't threaten you in any way or anything like that.

A. No, sir.

Q. Didn't abuse you in any way, of course.

A. No, sir.

Q. And then Saturday nobody asked you any questions, did they?

A. Well, no, sir, not as I know of.

Q. Didn't abuse you or threaten you in any way here at the county. Nobody did that, did they?

A. No, sir.

Q. And then on Sunday nobody abused you or threatened you in any way, did they?

A. No, sir.

Q. I see. Then Monday nobody abused you or threatened you in any way.

A. No, sir.

Q. And nobody questioned you on Sunday nor Monday.

A. No, sir, I believe not.

Q. So, the first time after you came to the county, the first time that you talked to any peace officer, was when you talked to Mr. Gene Howell Tuesday morning. Is that [fol. 239] right, sir?

A. No, sir.

Q. That's wrong?

A. Well, I believe it was Mr. Fletcher. Some of them come up and got me and taken my fingerprints.

Q. Oh, to take your fingerprints. They didn't talk to you about the case?

A. No, sir.

Q. They didn't abuse you in any way?

A. No, sir.

Q. They didn't hurt you or scare you in any way, did they?

A. No, sir.

Q. Just to take your fingerprints.

A. Yes, sir.

Q. All right, except to take your fingerprints, did anybody talk to you or question you or scare you or abuse you in any way here at the county?

A. No, sir.

Q. All right. And Tuesday morning, when you were talking to Mr. Howell,—you know Mr. Howell, the man who testified here today?

A. Yes, sir.

Q. When you were talking to Mr. Howell, he didn't abuse [fol. 240] you in any way, did he, Mr. Clewis?

A. No, sir, he didn't abuse me.

Q. He didn't threaten you?

A. No, sir.

Q. And Mr. Fletcher didn't abuse you in any way, did he?

A. No, sir.

Q. He didn't threaten you in any way?

A. No, sir.

Q. And you certainly had no reason to be scared of Mr. Howell, did you, sir?

A. Well, I don't know, sir.

Q. Did he do anything to make you scared of him?

A. No, sir, he never did nothing for me to be scared of him.

Q. And did Mr. Fletcher do anything to make you scared of him?

A. No, sir.

Q. He treated you real nice in every way. Is that right—Mr. Fletcher and Mr. Howell?

A. Yes, sir, they talked all right.

Q. And did you talk to Mr. Mims, too?

A. Yes, sir.

Q. That morning. Mr. Mims treated you nice, didn't he?

A. Yes, sir.

[fol. 241] Q. He didn't scare you in any way, did he?

A. Well, neither one of them, I would say, didn't scare me. I was scared at the beginning.

Q. What were you scared of, Mr. Clewis?

A. Well, he asked me questions.

Q. You mean Mr. Howell scared you by asking you questions?

A. No, it was not exactly by asking me questions, but it was the question he asked.

Q. You were fed all right when you were here in the county, weren't you, sir?

A. Yes, sir.

Q. Got all the rest you needed?

A. Yes, sir.

Q. Mr. Fletcher didn't—as I say now, I don't want to be repetitious—Mr. Fletcher didn't scare you, did he? Did he do anything to scare you?

A. No, sir, that is what I say; he didn't.

Q. Mr. Mims didn't do anything to scare you, did he?

A. No, sir.

Mr. Smith: Pass the witness.

Redirect examination.

By Mr. Legg:

Q. Now, Marvin, I want to ask you one question. I believe you said the statement that you made to Mr. Howell and [fol. 242] to Mr. Fletcher—was it true or not?

A. No, sir, it wasn't true.

Q. Now tell me why you signed it.

A. Well, first, Mr. Fletcher, I mean Dawson, testified here——

Q. Mr. Howell?

A. Mr. Howell one night got down there and he asked me about taking a polygraph test, and I told him I did not want to take one.

Q. And had you told Mr. Howell before that and Mr. Fletcher that you didn't kill your wife?

A. Yes, sir, I told them before that.

Q. And they mentioned the polygraph to you.

A. Yes, sir.

Q. What did that have to do with your signing the statement?

A. Well, they went and got Mr. Mims, and when they went and got him, why I was scared because I could see it looked like the same thing happening all over again, that three or four days of abusing, and I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement because I had already made two statements and I didn't figure it made any difference. I had signed two.

Q. Marvin, would you have given that statement had it [fol. 243] not been for the treatment that you had received?

A. No, sir.

Q. From the hands of the officers the week before.

A. No, sir, I shore wouldn't have.

Mr. Legg: That is all.

Rcross-examination.

By Mr. Smith:

Q. When Mr. Fletcher and Mr. Howell talked to you here at the county, Mr. Clewis, they didn't talk to you for a long time, did they?

A. You mean that——

Q. That Tuesday morning?

A. Well, no, sir, I don't think. Now I don't how long they talked to me.

Q. You weren't all tired out and weak and sick, were you, sir?

A. No, sir. I wasn't hungry, but I wouldn't say I wasn't sick.

Mr. Smith: Pass the witness.

Redirect examination.

By Mr. Legg:

Q. Marvin, from the time that officer Morales came and got you at 6:30 that Monday morning until the following Friday after you had made that second confession, did you [fol. 244] ever talk to a lawyer, one the Court appointed for you, or anything like that?

A. Before I made the second statement?

Q. Yes.

A. No, sir.

Q. All right. Now when did you finally obtain me as your attorney? Do you remember?

A. Well, no, sir, I sure don't. I was here in the county, though.

Q. Was that after you had made the third statement that we have been referring to?

A. Yes, sir, I believe it was, because I never saw you until after that.

Q. And you didn't have any attorney at any time to advise you during the period of time of these two confessions we have been talking about.

A. No, sir.

Mr. Legg: I believe that is all.

Recross-examination.

By Mr. Smith:

Q. Mr. Clewis, do I understand you correctly to say—excuse me one minute. Mr. Clewis, I didn't catch what Mr. Legg asked you. You say you did not see a lawyer before you made that second confession on Thursday. Is [fol. 245] that the one you are talking about, the one on Thursday?

A. Yes, sir.

Q. You didn't see a lawyer before you made the confession on Thursday. Is that correct? Is that what you said?

A. Yes, sir.

Q. All right. You are sure of that. You didn't talk to a lawyer at all.

A. I talked to a lawyer——

Q. You talked to a lawyer?

A. But now wait. I don't know what day it was. I don't know whether I had made the second statement.

Q. You don't know what?

A. I don't know whether I had made the second statement or not.

Q. Oh, you are not sure whether you made the second statement. It is possible that you could have talked to a lawyer before you made that second statement. Is that right, sir?

A. It is possible, but he wasn't representing me if I was. He didn't give me no advice.

Q. Well, let me ask you this, Mr. Clewis. To refresh your memory, isn't it a fact that you did talk to a lawyer on Thursday morning down at the police station before you made this statement or confession late Thursday afternoon?

[fol. 246] A. Well, just like I said, I don't know what day it was, but I talked to a lawyer.

Q. You talked to a lawyer. You remember what his name was?

A. Yes, sir.

Q. What was his name?

A. (No reply)

Q. Was it H. S. Harris, Jr.?

A. Yes, sir.

Q. But you just don't know whether it was before or after the confession.

A. No, sir, I really don't.

Q. It could have been before?

A. It could have.

Q. It could have been after?

A. Yes, sir.

Q. Was it before you came to the county or after you came to the county that you saw the lawyer?

A. It was before I came to the county, but it seems like to me I had made two statements. I am not sure of that.

Q. You are not sure. Did you talk alone with the lawyer, just you and him alone?

A. Yes, sir.

Mr. Smith: We have no further questions.

[fol. 247] Redirect examination.

By Mr. Legg:

Q. I believe you said, Marvin, that you think you had made two statements before you ever saw a lawyer.

A. Yes, sir, I think I had.

Q. Let me refresh your memory, or try to. Do you remember whether or not it was before or after you went to Borger?

A. Well, no, sir, but it do seem to me like I had made the second statement for something that the lawyer said to me.

Q. All right. Well, now, you had made the second statement then, you made it after you got back from Borger. Is that right?

A. Yes, sir.

Q. The same day you went to Borger.

A. Yes, sir.

Q. But you can't place it in your mind with reference to when you went to Borger as to when you saw Mr. Harris?

A. No, sir, I shore can't.

Mr. Legg: All right, that is all.

Mr. Smith: We have no further questions.

The Court (To Witness): Step down.

Mr. Legg: Your Honor, that is the evidence we present for our Motion.

[fol. 248] Mr. Smith: If the Court please, now then in order to refute the remarks that the defendant has made concerning this thing, we have to bring in the officers to see what their story is as to whether it is true or untrue what the defendant has said and whether they agree or disagree with what the defendant has said, so we call Mr. Morales to the stand.

JESUS MORALES, called by the State as a witness in rebuttal of testimony presented by the Defendant in his Motion to Exclude Confession, testified as follows, after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. Jesus Morales.
Q. Your employment, please, sir?
A. Midland Police Department.
Q. You know the defendant, Marvin Clewis?
A. Yes, sir.
Q. You see him in the courtroom here?
A. Yes, sir, he is sitting next to Mr. Legg.
Q. How long have you been on the Midland Police Department?
[fol. 249] A. Little over six years.
Q. Were you on the Midland Police Department back in July, 1962?
A. I was.
Q. Mr. Morales, I call your attention to the day of Sunday, July 8, 1962.
A. Yes, sir.
Q. I ask you, sir, if you saw the defendant on that day.
A. Yes, sir, I did.
Q. About what time?
A. Around six o'clock in the morning.
Q. Where was that, please, sir?
A. That was at the residence of Elizabeth Johnson.
Q. All right, what happened at the residence of Elizabeth Johnson?
A. I went over to the house and talked to Mrs. Johnson and I asked her if Mr. Clewis was in there at the home and she advised that he was, and then I asked her if I could come in and talk to him. She said to come on in, that he was in bed, so I walked in the bedroom and I saw Mr. Clewis.
Q. Did you identify yourself as being a peace officer or not there?

A. Yes, sir, I did.

Q. All right, then what happened?

[fol. 250] A. I talked to Mr. Clewis and advised him that I wanted to talk to him and wanted to talk to him at the police station and asked him if he would come along.

Q. Did he.

A. He did.

Q. All right, and when you got to the police station, do you recall whether or not the defendant had an opportunity to have any breakfast or not? Do you recall about that on that Sunday morning?

A. Yes, sir, he had some coffee and rolls.

Q. All right, sir. Did you talk to him at the police station for awhile, or not?

A. Yes, sir.

Q. About how long?

A. Oh, about an hour or hour and a half.

Q. All right, then what happened?

A. Then I put him up and went out.

Q. By "putting him up," what do you mean?

A. I placed him in jail.

Q. In a cell?

A. Yes, sir.

Q. How long was he in the cell?

A. Well, I didn't get back to talk to him until about eleven o'clock that same morning.

[fol. 251] Q. All right, and what happened at eleven o'clock, as best as you can recall? Did you give the defendant anything or not?

A. I think I brought him some cigars. I am not sure about that.

Q. All right. Does the city jail serve lunch on Sundays?

A. No, sir, not at noon.

Q. Sir?

A. Not at noon. Just the people that work there.

Q. Trusties.

A. All right.

Q. All right, and then what happened to the defendant? You brought him some cigars around eleven o'clock, you said. Did you interrogate him more at that time or not?

A. I might have talked to him a few minutes.

Q. What do you mean by a few minutes? Five or ten, or an hour or two?

A. Oh, about fifteen or twenty minutes.

Q. All right, then did anybody else talk to him at that time or was he locked back up, or what?

A. He was locked back up.

Q. All right, how long did he stay locked up this time?

A. Oh, maybe an hour or hour and a half.

Q. Then what happened?

[fol. 252] A. I came back and talked to him.

Q. All right, anybody else with you when you talked to him this time?

A. No, I don't recall. I was by myself, I am pretty sure.

Q. All right, then what happened?

A. Oh, I talked to him some more.

Q. Did you threaten him or abuse him in any way?

A. I did not.

Q. Any time during this day on Sunday did you threaten him or abuse him?

A. No, sir.

Q. Strike him?

A. No, sir.

Q. Draw back like you were going to hit him?

A. No, sir.

Q. Was Wayne Gideon there helping you talk to him on that Sunday?

A. No, sir. I believe he was off that day.

Q. Is Wayne Gideon a tall officer with a sort of growth here on the side of his head?

A. Yes, sir.

Q. He wasn't there with you on that Sunday?

A. No, sir.

[fol. 253] Q. Did the defendant have any visitors on Sunday afternoon?

A. He did.

Q. Do you recall who they were?

A. Yes, sir.

Q. Who?

A. His sister. I think her name is Annie Mae Owens, and Elizabeth Johnson and Rachel Garnett.

Q. All right. Did they have a chance to talk to him alone or not?

A. Yes, sir.

Q. That was Sunday afternoon?

A. Yes, sir.

Q. When is the feeding time on Sundays in city jail?

A. It is five o'clock, sir.

Q. Do you know whether or not the defendant had an opportunity to eat on Sunday?

A. I believe he said he wasn't hungry, sir.

Q. Do you know whether or not Elizabeth Johnson brought him any soup?

A. Yes, sir, she brought some that day. I don't recall what time it was.

Q. What time was he locked up, if you know?

A. I don't remember. I left there about 5:30.

[fol. 254] Q. Was he locked up when you left or was he still out in the hall?

A. I am pretty sure he was locked up.

Q. Did I understand you correctly awhile ago that he was offered some food?

A. Yes, sir. He either wasn't hungry or didn't want that food. That is when I think Mrs. Johnson volunteered to get him some soup.

Q. I see.

A. She asked us if she could bring it to him, and we said that she could.

Q. Well, was there or was there not any food in your presence and in the defendant's presence on that Sunday afternoon?

A. A plate was brought to him.

Q. Oh, I see, a plate was brought to him.

A. Yes, sir.

Q. Did it have food in it? I'm not trying to be funny about this, but——

A. Yes, sir.

Q. —did the plate have food in it?

A. Yes, sir.

Q. All right, sir. Did you talk to him any more on that Sunday?

[fol. 255] A. I did not.

Q. Did any of the rest of the detectives talk to him any more on that Sunday?

A. I don't know, sir.

Q. But you didn't talk to him any Sunday night.

A. No, sir.

Q. You didn't talk to him around midnight Sunday night?

A. No, sir.

Q. Or one or two or three o'clock early Monday morning?

A. I did not.

Q. On Sunday were you trying to coerce or use undue influence or persuasion to get him to make a confession?

A. No, sir.

Q. All right, we will go to Monday now. Monday, July 9th. Were you on duty that day?

A. Yes, sir.

Q. Did you see the defendant on that day?

A. Yes, sir.

Q. About what time did you first see him?

A. Oh, it was close to seven o'clock in the morning.

Q. Do you know whether or not he had breakfast on that Monday morning?

A. He was in the cell, and when we went up there to get him out there were some rolls—you could see them from the [fol. 256] door down the hallway of the cell block there, and he had them laying between the bars——

Q. —of his cell?

A. Yes, sir.

Q. All right, what happened to the defendant then?

A. We got him out and went downstairs with him.

Q. All right, where did you go next with the defendant?

A. We went out on the farm-to-market road out here north of town.

Q. All right, and did you go out there and stop some place or did you just keep on driving?

A. We went up to—it's a side road running off from this farm-to-market road, and we were heading west and we took a right turn on it.

Q. All right, sir. Was there a little hill up there and all that; hole in the ground and all that?

A. Yes, sir.

Q. All right. Did you drive up to the hill?

A. Well, no, we drove, oh, pretty close to it, not run right up to it.

Q. Then what happened? You got up close to the hill and then what happened?

A. We got out of the car. Sgt. Kuykendall was with me and Mr. Clewis here, and we got out of the car.

[fol. 257] Q. All right, did you all or not go up the hill?

A. We did.

Q. Who led the way?

A. Mr. Clewis.

Q. Were you forcing him or coercing him or threatening him or anything of that nature?

A. No, sir.

Q. He led the way?

A. He did.

Q. Where did you go up the hill? What did you find?

A. We went over this hill and once we were over coming down, there was a fork on the path there and one went to the right and the other went to the left.

Q. What happened?

A. Well, he took the one to the left and walked a few feet on that, and then he come to a stop.

Q. All right, and then what happened?

A. Walked around him and proceeded on to where this hole was in the ground.

Q. All right, was there anything bloody or gory, or anything like that around that hole?

A. No, sir.

Q. It was just a hole in the ground. That right?

A. Yes, sir.

[fol. 258] Q. All right, and then what happened?

A. I asked him if he knew what that was.

Q. What was the answer?

A. He answered, "I guess that is where she was buried."

Q. All right.

The Court: I wonder if we can shorten this by leaving out a recitation of details that doesn't pertain to any alleged coercion or beating. Otherwise, I am afraid we will be up here all right.

Mr. Smith: You are right, sir.

The Court: Go ahead.

Q. All right, did you threaten him or coerce him in any way out there at that hill?

A. No, sir.

Q. Did you draw back as if to hit him out there at that hill?

A. No, sir.

Q. You were out there a short time——

A. Yes, sir.

Q. —at that hill, and you got back in the car, and where did you go next?

A. We came back to the station.

Q. Came back to the station. Did he change clothes down there?

[fol. 259] A. Yes, sir.

Q. Fresh change of clothes?

A. Yes, sir.

Q. All right, then what happened to him? Did you threaten him or anything down at the police station?

A. No, sir.

Q. Did anybody else abuse him in any way down there?

A. No, sir.

Q. Then what happened? What happened to the defendant?

A. The defendant changed clothes and we were there close to thirty minutes there at the police station, and then we took him to the Department of Public Safety.

Q. All right, took him to the Department of Public Safety. What happened to him out there?

A. He was sitting down. They've got a little room up there that is locked. I mean, it is a sort of little waiting room for prisoners when we take them up there.

Q. Chair in there?

A. Yes, sir.

Q. You put him in there.

A. Yes, sir.

Q. How long was he in there?

A. Oh, not too long, just what it took us to talk to the polygraph operator and explain the case.

[fol. 260] Q. All right, was there anybody interrogating him or anything of that nature while he was in that little room?

A. No, sir.

Q. All right, and then did the interrogation begin after a little bit, after an hour or so?

A. Well, he was brought into this polygraph room and

he was told the basic fundamentals of the machine there, the way they operated it.

Q. Before Burl Reed gave him the polygraph information, instructions on taking it, were you observing this?

A. Yes, sir.

Q. Were you in the same room or adjoining room?

A. Adjoining room.

Q. Looking through a one-way glass?

A. Yes, sir.

Q. All right, were you in there off and on looking through that one-way glass off and on all Monday morning?

A. Yes, sir.

Q. Did you at any time see anybody abuse this defendant in any way?

A. No, sir.

Q. Curse him?

A. No, sir.

Q. Hit him?

[fol. 261] A. No, sir.

Q. Draw back as if to hit him?

A. No, sir.

Q. Did you talk to him any that Monday morning out there at the DPS, Department of Public Safety?

A. I don't think I talked to him. I might have talked to him once or twice to ask him if he wanted to use the bathroom or something like that.

Q. When you talked to him, did you talk to him for an hour or hour and a half at a time, or brief periods?

A. No, sir, a couple of minutes.

Q. We are talking about Monday morning now.

A. Yes, sir.

Q. You did see Burl Reed, the polygraph operator, with him from time to time Monday morning.

A. Yes, sir.

Q. Long periods of time or short periods of time?

A. Short periods of time.

Q. All right, what about around Monday noon? Did you give this defendant anything or did you offer him anything?

A. I think I brought him a coke.

Q. Brought him a coke. Did you all bring him any food of any sort? He said he wanted a coke. Is that right?

A. Yes, sir. I asked him if he wanted some food and he [fol. 262] said no, and I asked him if he wanted some soup and he said no, and I asked him if he wanted some milk and he said no, and I asked him if he wanted a coke and he said, "Yeah, I'll take a coke."

Q. You got him a Coca Cola?

A. Yes, sir.

Q. All right, and then that afternoon was there any interrogation of this defendant?

A. Yes, sir.

Q. Were they long periods of interrogation or short periods?

A. Short periods.

Q. Were there rest periods in between or not?

A. Yes, sir.

Q. There were rest periods in between?

A. Yes, sir.

Q. Short periods of interrogation; would you give us some minutes on that?

A. Anywhere from fifteen to twenty minutes.

Q. At a time.

A. At a time.

Q. And then, if I understand you right, there were rest periods.

A. Yes, sir.

[fol. 263] Q. And then another period with an officer, and so forth.

A. That is correct.

Q. All right. Any time Monday, Mr. Morales, especially Monday afternoon, did you slap or strike this defendant once, twice or three times?

A. None.

Q. You didn't hit him any?

A. No, sir.

Q. Did you threaten him any?

A. No, sir.

Q. Monday afternoon at the DPS, did you curse him?

A. No, sir.

Q. Did you call him a "black s.o.b., you better talk"?

A. No, sir.

Q. Did you observe anyone else abusing him in any way at the DPS on Monday afternoon?

A. I did not.

Q. Did you hear anyone say—you were around out there at the time?

A. I was there all the time.

Q. Did you hear anyone say "you can't leave here until you talk"?

A. No, sir.

Q. Did you hear anyone say, "We will get you some milk [fol. 264] if you will talk"?

A. No, sir.

Q. On Monday night at the city police station, did you question the defendant for an hour to an hour and a half at a time—on Monday night, July 9, 1962?

A. No, sir.

Q. Did a big man with a pipe question him for an hour to an hour and a half at a time on that night?

A. Not to my knowledge.

Q. All right, sir. We got to Tuesday, Mr. Morales, July 10th. Did you question the defendant any on Tuesday, July 10th?

A. I don't believe I talked to him on that day.

Q. You didn't talk to him at any time on that day, Tuesday?

A. I am pretty sure I didn't.

Q. All right, then you didn't talk to him; did you threaten him, did you abuse him in any way on Tuesday?

A. No, sir.

Q. What about Tuesday night? Did you question him?

A. I did not.

Q. Did you abuse him or threaten him in any way?

A. No, sir.

Q. Were you anywhere around him on Tuesday night? [fol. 265] A. No, sir.

Q. Thursday, July 12th, did you go to Borger with the defendant?

A. No, sir.

Q. Did you go to the DPS the same time the defendant was there on Thursday, July 12th?

A. I did.

Q. On Thursday, July 12th, did you curse and use profane language toward the defendant?

A. I did not.

Q. Did you raise your hand as if to hit the defendant on Thursday, July 12th?

A. I did not.

Q. On Thursday, July 12th, did you say to the defendant, "Come on, you better play ball and give us a confession"?

A. No, sir.

Q. Did you ever say, "You black s.o.b., you better confess"? Did you ever say that to the defendant?

A. No, sir.

Q. Did you ever try to persuade or coerce this defendant to ever make a confession?

A. I did not.

Q. Did you try to persuade or coerce this defendant to make a confession on Monday afternoon? That would be the [fol. 266] 9th of July.

A. I did not.

Q. On Tuesday morning or Tuesday afternoon, July 10th?

A. I did not.

Q. On Thursday did you try to coerce or persuade unduly this defendant to make a confession, sign a confession?

Mr. Legg: We want to object to that question, your Honor. It is calling for a conclusion of the witness as to what he did. Coerce and persuade might be all right, but unduly is hardly the test.

Q. Did you coerce the defendant to make a confession on Thursday, July 12th?

A. I did not.

Q. Did you threaten him if he wouldn't make one?

A. I did not.

Q. Did you threaten him he better make one or else, or anything of that nature?

A. No, sir.

Q. All right, sir. Thursday you did not take the defendant or accompany the defendant to Borger, Texas. Right?

A. I didn't.

Q. All right. It wasn't Thursday, but you did make a trip to Borger with the defendant, didn't you?

[fol. 267] A. Yes, sir.

Q. All right. On the trip you did make to Borger, I will ask you this, sir: Did you abuse him in any way?

A. No, sir.

Q. Was he offered food at lunch time?

A. Yes, sir.

Q. Did you buy him any food or someone buy him food?

A. We bought him some milk. Pretty sure we did.

Q. He was offered food. O.K. Was he offered more than milk?

A. Yes, sir.

Q. On that day? All right, sir. Did you curse and abuse him on the way to Borger?

A. No, sir.

Q. Did you curse and abuse him on the way back from Borger to Midland?

A. No, sir.

Q. And after you returned from Borger, did you take him to the Department of Public Safety the same day? After you returned from Borger, did you take him to the Department of Public Safety the same day?

A. No, sir.

Q. And question him and abuse him at the Department of Public Safety on the same day he came back from Borger?

A. No, sir.

[fol. 268] Q. Did you search his truck at Borger?

A. We did.

Q. Did he give you permission to search the truck?

A. He did.

Q. Did he visit with his friends or relatives at Borger?

A. He visited with some people. I think his brother-in-law was there.

Q. All right. Did you hear John Wood say, "Get your ass over," or something like that at Borger, "Get your ass out of the way," or something of that nature?

A. No, sir.

Q. Did you hear John Wood abuse him or curse him in any way during that trip to Borger?

A. No, sir.

Q. Or coming back from Borger?

A. No, sir.

Q. All right, sir. Did you see the defendant after he was transferred to the county jail?

A. No, sir, not to my knowledge.

Q. At any time during this week, from Sunday, July 8th through Friday, July 13th, 1962, did you ever refuse this defendant food?

A. No, sir.

[fol. 269] Q. Drink?

A. No, sir.

Q. Rest?

A. No, sir.

Q. Do you know of anyone else, police officials, during that week refusing him food, drink or rest?

A. No, sir.

Q. Did you use undue influence to get the defendant to sign the permit to take the polygraph on Sunday, July 8th?

A. What was the question again?

Q. Did you use coercion or threats to get the defendant to sign the permit for him to take the polygraph test on Sunday, July 8th?

A. No, sir.

* * * * * * *

Cross-examination.

By Mr. Legg:

Q. As a matter of fact, on Sunday, July 8th, in the afternoon, you went down and got Marvin Clewis' mother-in-law and brought her to the city jail, didn't you?

A. I went where to get her?

Q. Somewhere in town or her home. Did you go anywhere and get her?

A. No, sir.

Q. You didn't?

[fol. 270] A. I didn't leave the police station.

Q. You said she was there.

A. She was.

Q. She came by herself?

A. She did.

Q. Did you talk to her before she went up there?

A. I might have.

Q. You told her she ought to get Marvin to take a polygraph test, didn't you?

A. Possibly.

Q. You told her it would help him if he did, didn't you?
A. I don't recall saying that.
Q. Do you think you might have said that?
A. It is possible.
Q. But you didn't go get her.
A. She was there at the police station.
Q. By herself?
A. Well, no, some other people there.
Q. There were?
A. Yes.
Q. What time of day was that?
A. In the afternoon.
Q. Sometime in the afternoon?
A. Yes, sir.
[fol. 271] Q. You were there all day that day?
A. On and off. I was working that day.
Q. Well, you said you didn't leave the police station, though.
A. Sunday?
Q. Yes.
A. Sure, I left it. I was working.
Q. You were working on Marvin Clewis, weren't you?
A. I wasn't with him all the time.
Q. You went down there about six o'clock in the morning without a warrant and got him out of bed and brought him up to the police station.
A. He was asked to come to the police station.
Q. He was what?
A. He was asked if he wanted to come to the police station.
Q. He was asked.
A. That is correct.
Q. You didn't tell him he was supposed to come with you?
A. I told him if he wanted to come with me I wanted to talk to him.
Q. What if he hadn't come?
A. He would have stayed there.
Q. He would have stayed there, wouldn't he?
[fol. 272] A. That's right.
Q. And if you had wanted to see him, you would have come down here to somebody and gotten a warrant and gone out there and got him, wouldn't you?

A. If I had sufficient grounds to get a warrant.

Q. Why didn't you do that? Why didn't you get a warrant?

A. I just answered that question.

Q. What were you doing in this case anyway, Morales?

A. What was I doing?

Q. Yes.

A. I was working. My duty as a police officer is to work.

Q. You aren't a member of the sheriff's office of this county, are you?

A. I am a member of the Midland Police Department, sir.

Q. Well wasn't this body discovered outside the city limits, and doesn't your jurisdiction end at the city limits of this town?

A. It does.

Q. All right. You knew this body had been found outside the city limits, didn't you? I fact, you had been out there, hadn't you?

A. That's right.

Q. Well, what were you doing in this case? Did the sheriff's department have you to come in and help them?

[fol. 273] Mr. Smith: If it please the Court, I don't see the relevancy of this line of questioning at all and object to it as being irrelevant.

Mr. Legg: Your Honor he went out there without a warant and got this man out of bed at six o'clock in the morning.

The Court: Go ahead.

Q. Did the sheriff's office ask you to help them?

A. No, sir.

Q. You knew they were conducting an investigation of the case, didn't you?

A. Well, I knew they were doing some work on one case.

Q. So, according to what you have testified to here, Morales, you treated Marvin Clewis like a king down there at that police station, didn't you? That right?

A. I treated him like I treat everybody.

Q. Started at six o'clock in the morning. That right?

A. That is correct.

Q. And what did you go down there at that hour for?

A. That is when I go to work.

Q. You go to work at six?

A. That's correct.

Q. Every morning?

A. Oh, not every morning. It varies. I go at different [fol. 274] hours, stay different hours.

Q. All right. Now, you don't work a set number of hours on your job, do you?

A. Well, no. Supposed to work eight hours, but sometimes I work fifteen or twenty hours. It all depends.

Q. When you took Marvin Clewis down to the police station, I suppose you had him leave his stuff down at the desk.

A. No, we went upstairs.

Q. You went straight on upstairs?

A. Yes, sir.

Q. Didn't take any of his personal belongings or anything like that?

A. No, not then.

Q. When did you do that?

A. It must have been about eight, about eight o'clock.

Q. About eight o'clock.

A. That's right.

Q. All right and you had been talking to him since you got there then. Is that right?

A. That's right.

Q. And what had you been talking to him about? About the time of day?

A. No, we were talking about his wife.

Q. Talking about his wife?

[fol. 275] A. That's correct.

Q. And you were asking him about it. Is that right?

A. Yes, sir.

Q. And did you tell him he was the one who killed her?

A. Why, I didn't know that was his wife out there.

Q. Oh, you didn't?

A. No.

Q. What were you doing talking to Marvin Clewis in the first place?

A. Well, we knew that his wife had been missing, and we were just trying to find out if he knew where she was.

Q. And then you talked to him about eight o'clock, until about eight o'clock?

A. That is correct.

Q. Did you tell him that you thought he was responsible for it?

A. For what?

Q. For the death of this particular person that was found out there.

A. Up to that time that body, the bones, had not been identified.

Q. When were they identified?

A. Well, I don't know for sure.

Q. Well, the next day you took him right out there to [fol. 276] that grave, didn't you?

A. That is correct.

Q. You were just visiting with him about his wife?

A. That's correct.

Q. And you didn't know whether there was—well, it didn't have anything to do with this murder?

A. Well, at the time we didn't know who it was. We were trying to find out who it was.

Q. All right, you were trying to find out who it was?

A. That's correct.

Q. That is why you held Marvin Clewis and took these things away from him and threw him in a cell and you say about eight o'clock, wasn't it?

A. Yes, sir, until I checked out his story.

Q. All right, and you didn't take him before a magistrate, as the law commands you to do, did you?

Mr. Smith: Now, if it please the Court, that is two questions in one, and we object to it as being two questions in one.

Mr. Legg: He knows what the law is, your Honor.

Q. Did you?

A. I think the law is that you don't have to take them out there. You have time to investigate your case. You just don't pick up a man and take him right to a magistrate.

[fol. 277] Q. As a matter of fact, you didn't take him anywhere before any kind of a magistrate until late Monday night, did you?

A. Until this was investigated.

Q. When was that?

A. It was Monday.

Q. When Monday?
A. Monday night.
Q. What time?
A. Oh, about eight.
Q. About eight o'clock?
A. Something like that.
Q. Now, Marvin Clewis never did leave that jail Sunday or Monday, did he? I mean, didn't leave the custody that you had him in?
A. He did not.
Q. And you didn't file any charges on him until late Monday night of any kind, did you?
A. That is correct.
Q. Now let me ask you, Sgt. Morales, you say you just talked to him about ten or fifteen minutes at a time?
A. When?
Q. Maybe I misunderstood your testimony. I thought that was the substance of your testimony all the way through.
[fol. 278] A. No, sir. I believe we took notes, and it was different.
Q. Well, I wouldn't know. Let's say Sunday. What was the longest time you talked to him?
A. Oh, I talked to him about an hour and a half or an hour and forty-five minutes.
Q. That was the longest you talked to him?
A. No, I might have talked to him after—about one o'clock I talked to him about, maybe, three hours.
Q. Maybe three hours?
A. Yes, sir, but in that time he had some people visit with him.
Q. But you were there with him?
A. That's correct.
Q. All right. Now, I believe you said you talked with him, talked to him, at eleven for about an hour and a half or so. Is that right?
A. No, sir.
Q. I beg your pardon. You talked to him about fifteen or twenty minutes at eleven. Is that all you talked to him?
A. I think that is about right.
Q. And then you locked him up for about an hour or hour and a half?

A. That's correct.

[fol. 279] Q. Did anybody else talk to him Sunday morning?

A. No, sir.

Q. Well, you weren't there all the time, were you?

A. No.

Q. You said you were out working Sunday?

A. Yes.

Q. You had some other officers that you were talking to about this case, didn't you?

A. No, sir.

Q. Nobody else?

A. I was the only detective on duty that morning.

Q. And detective or no, the other officers knew what you were doing down there, didn't they?

A. Well, you see, when they go to work in the morning, they go out in the field, and each is assigned to a district and they work out there. The man that might have known anything about it was the booking sergeant, but I don't think anybody else knew about it.

Q. I don't want to belabor this point because it will take up too much time, but I do want to ask you this,——

A. Yes?

Q. —Sgt. Morales, you did have other detectives who did question this defendant at various times while he was down there in city jail, didn't you?

[fol. 280] A. I didn't have then, but it is possible they might have talked to him.

Q. Well, you, in fact, know that they did, don't you?

A. I wasn't present if they did.

Q. Well, whether you were present or not, I ask you if you know as a matter of fact that some of them did talk to him.

A. It is possible.

Q. Well, you know, don't you?

Mr. Smith: Your honor, he has tried to answer the question. He said it wasn't in his presence and he doesn't know, it wasn't in his presence, and he heard they had and he can't answer it in any other way. He keeps coming back with the same question.

The Court: All right.

Q. I am asking you if you know, Sgt. Morales.

A. I know that in the course of investigative work that took place there was another officer who talked to him and it might have been while I was present, but after I left him that——

Q. (Interrupting). Who were the other officers?

A. There was—it is possible—we have a Sgt. Wicker working for us, Sgt. Kuykendall, Sgt. Gideon, and I.

Q. So, do you know whether any of those three officers [fol. 281] talked to him any time or not?

A. It is possible someone talked to him on the three to eleven shift, but I am not sure. I can't remember if they did, because I wasn't there.

Q. Now you are saying you didn't talk to him Sunday night?

A. I did not.

Q. Now you don't know whether anybody else did or not?

A. That's correct.

Q. I believe you said he wasn't given any food Sunday. Is that right?

A. Mrs. Johnson brought him some soup.

Q. What time did you leave the police station?

A. Oh, about 5:30.

Q. And wasn't that about the time she left?

A. I don't know what time she left.

Q. Anyway, she had not come back, had she, while you were there?

A. I don't recall if she went back or when she came back. I knew she brought some soup there.

Q. How do you know she brought some soup?

A. Because I saw it the next morning.

Q. You saw it the next morning. Where did you see it?

A. We have a kitchen up there in jail and it was in [fol. 282] the icebox.

Q. It was in the icebox?

A. That's correct.

Q. Had it been opened or used out of?

A. I can't tell you that. I don't remember if it was. I didn't pay that much attention to it.

Q. You don't know whether it was then, later or ever, so far as that is concerned, from your own knowledge?

A. That is correct.

Q. All right. But, so far as you know, he didn't have any food Sunday?

A. He was offered food.

Q. He didn't have any food Sunday?

A. Don't recall seeing him eating.

Q. I believe you testified awhile ago that he said that, according to your testimony, he wasn't hungry at feeding time.

A. Well, they took him a plate and he said he wasn't hungry. I told you he had food. Whether he ate or not I don't remember. I am pretty sure he didn't, because he said he wasn't hungry.

Q. All right, and where was this food brought to him?

A. To our detective office.

Q. To your detective office. Who brought it?

A. One of the trusties. I don't know who was in jail at [fol 283] that time. I don't who the trusty was.

Q. Anybody else in there in the detective office at the time?

A. Yes, sir, I think Sgt. Wicker was there and Sgt. Robbins was there, and I believe his sister and his girl friend were there.

Q. They were?

A. That's right.

Q. All right. But anyway, of your own knowledge, at least, he didn't have anything to eat Sunday?

A. Well, besides the rolls and coffee he had in the morning, I don't remember seeing him eat.

Q. Are you sure he had rolls and coffee in the morning?

A. Yes, sir.

Q. Are you sure he can drink coffee?

A. Sir?

Q. Are you sure he drank the coffee?

A. He was brought some coffee, and he drank it and ate the rolls.

Q. He did?

A. That's right.

Q. You are sure of that?

A. I certainly am; I was there.

Q. Now what about Monday? You said something about [fol. 284] —I didn't understand you—rolls or bars or something.

A. They were given to him and, as I stated, he still had them. He didn't eat them because I asked him if he wasn't hungry and he said no, he didn't want them.

Q. He didn't eat them?

A. He didn't eat them.

Q. Didn't eat any lunch?

A. He didn't want any.

Q. I believe you said he had a coke?

A. Yes, sir, and then he had some milk later that day.

Q. Had milk when?

A. Later that Monday afternoon.

Q. After he had made that statement?

A. No. They went and got him a quart of milk.

Q. When?

A. That afternoon. Must have been about three o'clock.

Q. What time was it with reference to the statement?

A. Oh, we didn't get the statement—must have been around 4:30 or 5:00 o'clock, so it was late in the afternoon.

Q. Let me ask you this question, Sgt. Morales: were you the officer who told the newspaper reporter that this defendant said he would sign anything if they would just bring him some milk, or words to that effect?

A. No, sir.

[fol. 285] Q. All right, you weren't the officer who told the newspaper reporter.

A. I didn't say anything.

Q. You knew that was reported as being a fact, didn't you?

A. I read it in the paper.

Q. Now Monday, so far as you know, prior to the time he made that statement, all he had to eat was a coke, which you say you brought him?

A. And the milk.

Q. And the milk. And you said he had the milk before he made the statement?

A. I am pretty sure it was before. Sgt. Kuykendall went and got the milk.

Q. Could it have been after?

A. No, it wasn't after, because I was talking to him when it was brought in to him. He was drinking and we were talking and he was drinking.

Q. You were talking to him?

A. That is correct.

Q. Now, when he was out at the Department of Public Safety, according to your testimony, you must have gotten out there about eight o'clock in the morning. Is that right?

A. Eight or a little after.

[fol. 286] Q. How much time did he spend in the room with the polygraph operator?

A. Well, I didn't think he started on the test until about nine o'clock or little after. Oh, maybe an hour, if you put all of the time together.

Q. Did he give him more than one test?

A. I think he gave him two or three, you know, the card test and the preliminary test, and then he gave him one main test.

Q. All that taken how many hours?

A. I said about an hour if you put all the time together.

Q. Not over an hour?

A. No. I estimate about an hour.

Q. So he would have finished with that, then, about ten o'clock?

A. Well, no. What I am trying to say is he would stop and talk about fifteen minutes and then stop and wait and then talk to him another fifteen minutes, and that's what I say that if you put all the time together it would run into about an hour's time.

Q. About what time of day did you get through with that?

A. Well, he stopped giving him tests in the afternoon.

Q. Did you interrogate him that day?

A. I talked to him.

[fol. 287] Q. How many times?

A. Oh, off and on about three or four times.

Q. What did you talk to him about? The weather?

A. No, he wanted something to drink; he wanted to use the bathroom, something to smoke, something to eat.

Q. Sgt. Morales, did you ever say anything to him about making a statement?

A. Yes, sir.

Q. All right, when?

A. Oh, it was in the afternoon.

Q. In the afternoon. How long did you talk to him at that time?

A. Oh, I might have talked to him about thirty minutes.

Q. Could it have been longer?

A. No.

Q. Did anybody else talk to him that afternoon?

A. Burl Reed talked to him.

Q. Anybody else talk to him?

A. Oh, it is possible. I think John Wood might have talked to him.

Q. Did they talk to him for a long period of time?

A. No, sir.

Q. How long did they talk to him?

A. Oh, it would range from fifteen to twenty minutes.

[fol. 288] Q. And what time of day did you say you took this statement?

A. Oh, it must have been around 3:30 or 4:30. It would have been, let's say, 3:30 to 5:00. I am pretty sure it was about that time.

Q. Who was the last person you talked to before he gave that statement?

A. Before he talked to me?

Q. No, before he gave the statement.

A. He was talking to me.

Q. Did he give you the statement?

A. Yes, I took it in longhand.

Q. Who else was there?

A. I was by myself in the room with him.

Q. Did anybody else witness that statement?

A. Yes, sir. I was taking it in longhand.

Q. Where is that statement?

A. District Attorney's office.

Q. District Attorney's office? All right. Now, when did you take him before a magistrate? That night?

A. Yes, sir.

Q. Just as soon as you finished with the statement?

A. As soon as we got back to the station.

Q. Did you take him to the station first?

[fol. 289] A. Yes, sir, and from there we came over here to the courthouse.

Q. Why did you go to the station first?

A. We just went to the station.

Q. What did you do?

A. Sir?

Q. What did you do when you got there?

A. We went up there and got everything ready and called the Judge and took him to the Judge.

Q. You didn't call the Judge from out at the DPS building?

A. No, I didn't even call the Judge; somebody else called him.

Q. Where from?

A. I don't know; I think the police station.

Q. You think from the police station?

A. Yes, sir.

Q. Now, Sgt. Morales, isn't it a fact that you did talk with this prisoner for long periods of time on Sunday and long periods of time on Monday, that other officers talked to him both Sunday and Monday?

A. Well, let me say this——

Mr. Smith: Pardon me, sir. This is about three or four questions in one, your Honor. The witness can't answer four questions in one.

[fol. 290] Q. All right, let's just take it one at a time then. Isn't it a fact that you did talk to him for long periods of time on both Sunday and Monday?

A. No, sir.

Q. When did you first mention to him, Morales, about the fact that you thought he killed his wife?

A. Monday.

Q. Monday. You didn't say a word about it Sunday?

A. No, sir.

Q. Where was it when you first told him about it?

A. It was at the DPS.

Q. What did you take him out to the grave for?

A. We just went out there.

Q. Just riding around?

A. No, we went out there.

Q. I know you went out there. I said why?

A. We just took him out there.

Q. Is that the only way you are going to answer the question?

A. We didn't even talk to him about it. The only thing

we asked him was if he had been on that road, and he said he had.

Q. You never have answered my question as to why you took him out there.

[fol. 291] A. We just took him out there to see if he knew the place.

Q. All right, why didn't you answer that when I asked you at first?

Mr. Smith: Your Honor, that question is improper. He has no right to ask him a question like that at all, of why he didn't answer the question when he asked it the first time.

The Court: Gentlemen, we have had about twelve hours of it today. Let's shut her down until in the morning.

Mr. Legg: Your Honor, I have got one more question of this witness and then I am through.

The Court: All right.

Q. Isn't it true, Sgt. Morales, that you did slap this defendant?

A. No, sir.

Q. Not on one occasion but on two occasions?

A. I never touched the man.

Q. You never touched a man?

A. I never touched the man. You asked me if I slapped him. I did not.

Q. This man you are talking about?

A. That is correct.

Q. Well, you certainly aren't saying that you never have [fol. 292] slapped a prisoner, are you?

Mr. Smith: Oh, your Honor, we certainly object to that. He has no right to ask that question.

The Court: Sustained.

Mr. Legg: Note our exceptions.

Q. But by your own testimony, Sgt. Morales, you admit, don't you, that to your knowledge he didn't have anything to eat from early Sunday morning, around six or a little after, until he made this statement, except for a coke and, you say, some milk?

A. He was given the opportunity to have anything he wanted.

Q. Did he have anything to eat?
A. He didn't want any.
Q. The question is, did he?
A. No, sir.

Mr. Legg: That is all.
Mr. Smith: No further questions.

* * * * * * *

[fol. 293] JOHN WOOD, called by the State as a witness in rebuttal of testimony presented by the Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows, after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please.
A. John Wood.
Q. Your employment, please.
A. Texas Department of Public Safety.
Q. All right, sir. You are also known as the Texas Ranger?
A. Yes, sir.
Q. And were you a Texas Ranger in July of 1962?
A. Yes, sir.
Q. Were you on duty?
A. Yes, sir.
Q. Do you know the defendant, Marvin Clewis, seated there at counsel table?
A. Yes, sir, I do.
[fol. 294] Q. You know him when you see him?
A. Yes, sir.
Q. All right, Ranger Wood. I call your attention, Ranger Wood, to Monday, July 9th, and ask you, sir, if out at the Department of Public Safety here in Midland you had occasion to see Marvin Clewis out there—Monday, July 9th?
A. Yes, sir, I did.

Mr. Legg: Your Honor, I want to interpose an objection

here. The witness is referring to some notes or a report of some kind which are not in evidence, and I think we have a right to look at them.

Mr. Smith: I think when counsel goes to cross examine him he can look at any notes the witness testifies from.

The Court: Go ahead.

Q. All right, Mr. Wood, referring to that Monday at the DPS, did you put the defendant, Marvin Clewis, under long and prolonged questioning for long periods of time?

A. No, sir, I did not.

Q. Did you exert any force or threats against this defendant on that Monday?

A. No, sir.

Q. Did you slap this defendant once on that Monday?

A. No, sir, he wansn't mistreated while he was out at the Department of Public Safety.

[fol. 295] Q. Did you slap him twice?

A. No, sir.

Q. Did you slap him three times?

A. I didn't slap him any time.

Q. Monday morning or Monday afternoon?

A. Or any other time.

Q. Did you tell this defendant that you would turn his black ass wrong side out if he didn't confess?

A. No, sir, I did not.

Q. Did you call him a black s.o.b.?

A. No, sir, I did not.

Q. Did you force him to sign a confession?

A. No, sir, I did not.

Q. Did you try to, by force, try to get him to sign a confession?

A. No, sir.

Q. And again we are still talking about this Monday or any other time, but my questions specifically pertain to this Monday, the 9th. All right, did you mistreat him in any way on Monday, July 9, 1962?

A. No, sir, and not any other time either.

Q. When you would question him, about how long were the questioning periods, approximately?

A. On July 9th I talked to him about fifteen minutes.

[fol. 296] Q. That's all for Monday?

A. Yes, sir.

Q. O.K. All right, we move to Tuesday, July 10th. Did you threaten this defendant in any way?

A. I didn't see him on July 10th.

Q. You didn't see him on July 10th?

A. No, sir.

Q. Didn't see him at all?

A. No, sir.

Q. All right, and then I take it you didn't threaten him, you didn't whip him, you didn't threaten to whip him, and didn't call him a black s.o.b. on Tuesday?

A. No, sir, I did not.

Q. All right. Now we move to Thursday, July 12th. Did you see the defendant on that day?

A. On July 12th?

Q. Yes, sir, Thursday, July 12th.

A. Yes, sir, I talked to him.

Q. Did you question him over a long prolonged period of time?

A. I talked to him—I believe it was five minutes. It could have been fifteen minutes on that day. I believe I talked to him twice, five minutes one time and probably ten or fifteen minutes the next time.

[fol. 297] Q. All right, and that was all?

A. Yes, sir.

Q. Did you take him to Borger on that date, Thursday the 12th?

A. I believe it was on the 11th when we went to Borger.

Q. All right, it wasn't the 12th, was it?

A. No, sir, it was the 11th.

Q. All right, let's stay with Thursday, the 12th. Did you threaten him in any way out there at the DPS?

A. No, sir, I did not.

Q. Did you slap him?

A. No, sir, I never laid a hand on him or threatened him at any time.

Q. Did you raise your fist as if to strike the defendant on Thursday, the 12th?

A. No, sir, I did not.

Q. Did you coerce him trying to get him to sign a confession on Thursday, the 12th?

A. No, sir.

Q. All right, sir. Now let's talk about the trip to Borger, whenever it was you took him to Borger. I believe you said that was on Wednesday. Wednesday, the 11th, you took him to Borger?

A. Yes, sir, on July 11th.

[fol. 298] Q. All right, sir. Now then, on the way to Borger did you threaten him in any way?

A. No, sir, I did not.

Q. After you got to Borger, did you tell him to get his ass out of the way so you could search that truck up there?

A. No, I believe I told him to move back out of the way. He was trying to get up in the truck, and I told him to just move back out of the way and we would search the truck and save a lot of time.

Q. Were you threatening him when you said that?

A. No, sir.

Q. Were you calling him bad names up there?

A. No, sir, I did not.

Q. Did you draw back as if to strike him up there?

A. No, sir.

Q. Did you tell him on either this Wednesday, well, on that trip to Borger that "I have beat lots of s.o.b.'s like you. Don't you believe that?"

A. No, sir, I didn't tell him that.

Q. Did you tell him that, that quote, on Thursday?

A. I didn't tell him that at any time.

Q. All right, sir. Is it your testimony you never have abused this defendant in any way?

A. That is correct. I never have.

[fol. 299] Q. Physically? You have never abused him physically?

A. No, sir, I haven't.

Q. Have you ever abused him orally, with words?

A. No, sir, I have not.

Q. Did you ever see him here in the county jail or sheriff's office, anywhere here at the county, after he was transferred over here from the city jail?

A. No, sir.

Mr. Smith: We pass the witness.

Cross-examination.

By Mr. Legg:

Q. Were you out here at the hole where they said they found the remains of this body with the defendant at any time?

A. No, sir.

Q. You weren't out there on Monday morning?

A. No, sir.

Q. The defendant was never there when you were present?

A. No, sir.

Q. May I see those notes you have there?

A. Yes, sir. These are notes that were made at the time of the investigation.

Q. According to your testimony, then, it was on—the first time you saw this defendant was on Monday, July 9th.

[fol. 300] A. It was on July 9th. I don't believe I know the day.

Q. Whatever the day was——

A. It was on July 9th, yes, sir.

Q. And that you then didn't talk to him but fifteen minutes on that day?

A. Yes, sir.

Q. That was the only time you talked to him?

A. On that day.

Q. And what time of the day was that?

A. About 2:00 P.M.

Q. About two o'clock?

A. Yes, sir.

Q. And that was the first time you had seen him that day?

A. No, I had seen him up in the lie detector room but didn't question him.

Q. Of course, you all were trying to get a confession from him, weren't you?

A. We were trying to get the truth out of him, yes, sir.

Q. Well, you were trying to get him to sign a statement?

A. If he was the guilty party, we wanted one, yes, sir.

Q. All right, and that was what you were talking to him about, wasn't it?

A. That afternoon, yes, sir.

Q. And did you tell him he ought to sign a statement?

[fol. 301] A. I don't remember what I told him.

Q. You don't remember anything you told him?

A. No, sir.

Q. All right. Now, that is the only time you talked to him before he signed the first statement. Who did he give that statement to?

A. I believe it was to Wayne Gideon.

Q. Wayne Gideon?

A. I believe it was; I am not so sure.

Q. All right. Did you wtiness the statement?

A. I don't remember.

Q. The signing of the statement?

A. I don't remember.

Q. Now when was the next time you saw him? I think you said you didn't see him Tuesday and, according to your testimony, it was Wednesday when you saw him.

A. I didn't see him on the 10th, but the next time I saw him was about 6:55 A.M. on the 11th, July 11th.

Q. 6:55 A.M.?

A. Yes, sir.

Q. And that's when you went to Borger?

A. Went to pick him up at the police station, yes, sir.

Q. And who went with you?

A. Wayne Merritt, the chemist, and Jesus Morales.

[fol. 302] Q. And how long did it take you to get to Borger?

A. Oh, we stopped up, I believed it was Amarillo, and gassed up. We stopped out at the office first on that morning and called Seiling, Oklahoma, to be sure where his panel truck was. We stopped at the office first.

Q. Stopped at the office here?

A. Yes, sir.

Q. All right.

A. At my office.

Q. Now, do you know what time you got to Borger, was my question.

A. No, sir. It was before noon.

Q. All right, and then you got back to Midland at what time?

A. Well, I believe it was just before dark.

Q. All right. Now, let's shorten this testimony some, Mr. Wood. Let me ask you this question.

A. Sir?

Q. I said, let's shorten this some, and I just want to ask you about three more questions.

A. All right.

Q. Now the only other time that you saw him, according to your testimony, I believe, was on Thursday, and what time was that?

[fol. 303] A. That would be on the 12th. Was Thursday the 12th?

Q. Yes, sir.

A. I talked to him about 3:00 P.M. on the 12th.

Q. Was that the first time you had seen him that day?

A. No, sir.

Q. When was the first time you saw him?

A. I believe about 11:45 A.M.

Q. And did somebody bring him to see you, or what?

A. He was out in the polygraph room out there. The first time I saw him he was smoking a cigar and he had a glass of milk or milk container.

Q. He had a glass of milk at 11:45?

A. It might not have been right at 11:45, but somewhere in that time.

Q. All right. Now, you talked to him about fifteen minutes that afternoon?

A. Will you repeat the question?

Q. You talked to him about fifteen minutes that afternoon? Was that what your testimony was?

A. I talked to him first about five minutes, but I believe I did talk to him about somewhere around ten minutes.

Q. What did you say to him? Did you tell him he ought to make another statement?

A. I can't hear you.

[fol. 304] Q. Did you tell him he ought to make another statement?

A. I told him that we needed all the truth.

Q. Uh huh, and do you remember what you said?

A. I don't remember what I told him, no, sir.

Q. All right, but your testimony is you never at any time used any curse words to him?

A. No, sir, I did not.

Q. And you never at any time told him that it would help him if he made a statement?

A. No, sir, I didn't.

Q. Or told him what was liable to happen to him if he didn't?

A. No, sir, I did not.

Q. But you don't remember what you did tell him?

A. No, sir.

Q. Now, what time, according to your testimony, Mr. Wood, did he give the statement on Thursday, July 12th?

A. About 5:00 P.M. or soon after; it might have been 5:05.

Q. Who did he give that statement to?

A. Jesus Morales. First, he told me about it and then I told him to tell Jesus about it, and he did.

Q. Was that during the ten minute conversation you had with him?

[fol. 305] A. Yes, sir.

Q. Did he make more than one statement out there that day?

A. I believe he just made one that day.

Q. To your knowledge, did he ever make more than two statements?

A. He first made one that I believe Wayne Gideon wrote down in longhand, but he objected to one word, I believe "us" was in there.

Q. When was that?

A. Oh, that was——

Q. That was the first one on Monday?

A. The first one that was made out there.

Q. All right.

A. But I found out since that time that another statement had been made.

Q. Yes, but not while you were there at the Department of Public Safety.

A. No, sir. There were two, I believe——

Q. There were only two signed out there. Is that right?

A. Yes, sir. Two statements signed out there, as far as I know.

Q. Do you have any of those statements in your possession?

[fol. 306] A. No, sir.

Q. Do you know where they are?

A. There is a copy of one in Austin, of the statements in Austin.

Q. You don't know where the original is?

A. No, sir, I do not.

Mr. Legg: I have no more questions.

Redirect examination.

By Mr. Smith:

Q. Did you coerce the defendent to make a confession?

A. No, sir, I did not.

Q. Did you force him to make a confession?

A. No, sir, I did not.

Q. Did you persuade him to make a confession?

A. No, sir, we just told him to tell the truth.

Mr. Smith: Thank you. We have no further questions.

Recross-examination.

By Mr. Legg:

Q. He did deny it, of course, when you first talked to him, didn't he, before he made these statements?

A. Yes, sir, he did.

Q. And then on Thursday when you talked to him again, he denied he had done anything, didn't he?

[fol. 307] A. No, he didn't deny it that day, no sir.

Q. Well, why was he out there from, you said, 11:45 to 5:00 o'clock on that day?

A. He was being examined on the polygraph part of that time.

Q. And the rest of the time?

A. Sometimes he was just there in the hold-over room. I think we were out searching his car one day while he was out there.

Q. You went out and searched his car?

A. Yes, sir. We got permission from him to search a car that was on a vacant lot out there.

Q. You got written permission from him, didn't you?

A. Yes, sir.

Q. Did you get permission from him to search the panel truck in Borger?

A. I think we did, but I don't have a copy of it.

Q. You don't have that?

A. I don't have a copy of it.

Q. Then you don't know for certain whether you did or not.

A. No, sir, I don't.

Mr. Legg: That is all.

Mr. Smith: We have no further questions.

[fol. 308] Mr. Legg: I have one more.

Q. During any of this time that he was out at the Department of Public Safety, Ranger Wood, did you ever see him have anything to eat other than the milk you mentioned on Thursday or Monday, whenever it was, Monday?

A. Milk is all I saw. He could eaten something else and I probably wouldn't have seen him, but milk, I believe, is all he had out there.

Mr. Legg: That is all.

Redirect examination.

By Mr. Smith:

Q. Was he refused any food to your knowledge?

A. No, sir, he was not.

Q. Was he refused any rest to your knowledge?

A. No, sir, he was not.

Mr. Smith: That is all.

Mr. Legg: That is all.

Jesus Morales, being recalled by the State, testified further on Defendant's Motion, as follows:

Redirect examination.

By Mr. Smith:

Q. You are the same Jesus Morales who earlier was on [fol. 309] the stand?

A. That is correct.

Q. I have one question, Mr. Morales. On Monday night, July 9, 1962, did the defendant have a visitor, a guest, one Elizabeth Johnson, at the city jail?

A. Yes, sir, he did.

Mr. Legg: What night was that?

Mr. Smith: Monday, July 9th, 1962.

Q. Did he visit alone with her?

A. That's correct.

Mr. Smith: Thank you. That is all.

Recross-examination.

By Mr. Legg:

Q. You say that was on the night of July 9th?

A. That's correct.

Q. What time?

A. It must have been around nine o'clock.

Q. You saw her there?

A. That's correct.

Q. What did you say last night? You left the police station about 5:30 and didn't come back.

A. Monday?

Q. Oh, this was Monday.

A. That's correct.

[fol. 310] Q. Did you take her up there?

A. I didn't take her. She came there by herself.

Q. Well, I am talking about did you take her to the jail cell or to any place to visit with him?

A. He was downstairs. We had just brought him back from court, this courthouse.

Q. They visited downstairs?

A. They visited downstairs, and I believe they went upstairs and visited.

Mr. Legg: That's all.

Mr. Smith: No further questions.

BURL REED, Called by the State as a witness in rebuttal of testimony presented by the Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. What is your name, please, sir?
A. Burl Reed.
Q. What is your employment?
A. Polygraph examiner for the Department of Public Safety.
Q. And what was your employment in July, 1962, please?
[fol. 311] A. Polygraph examiner for the Department of Public Safety.
Q. Were you stationed here in Midland at that time?
A. Yes, sir, I was.
Q. Do you know Marvin Clewis, the defendant, seated over there by counsel?
A. Yes, sir, I do.
Q. All right, sir. I ask you, Mr. Reed, if you saw the defendant on Monday, July 9, 1962.
A. Yes, sir, I did.
Q. I ask you, sir, if you questioned him—did you see him out at the DPS that day?
A. Yes, sir.
Q. And I ask you, sir, if you questioned him over a long period of time without giving him rest.
A. No, sir, I did not.
Q. Do you know how long you did question him, approximately? Minutes, hours, days or what?

Mr. Legg: What day are you talking about?
Mr. Smith: Monday. We are talking about on Monday.

A. Most of the time it was just a matter of minutes in there.
Q. All right. Then, after a matter of minutes, did he have rest periods before he was talked to again?
[fol. 312] A. Yes, sir.
Q. Was he seated in a comfortable chair while you were talking to him and when he was resting?

A. Yes, sir, he was.

Q. All right. Were you trying to persuade him to sign a confession out there on that Monday?

A. No, sir, not I.

Q. Did you tell him that if he would sign a confession that you would get him some milk?

A. No, sir, I didn't.

Q. Did you tell him he could not leave until you all had gotten what you wanted?

A. No, sir.

Q. Did you exert any force or threat or coercion against this defendant——

A. No, sir.

Q.—in any way——

A. No, sir.

Q.—on this Monday? I am talking about this Monday.

A. No, sir.

Q. Did you slap this defendant at any time?

A. No, sir.

Q. I mean slap him with your hand or fist.

A. No, sir.

[fol. 313] Q. Did you slap him from two to three times out there on that day?

A. No, sir.

Q. Did you threaten to take him back out there to the grave and beat his black ass on this Monday?

A. No, sir.

Q. Did you call him a black s.o.b. on this Monday?

A. No, sir.

Q. Did this defendant ask you for food and you refused him food out there on that Monday?

A. He never did ask me for anything.

Q. All right, sir. Did you refuse him anything—any food or drinks?

A. No, sir?

Q. Or cigarettes or cigars?

A. No, sir.

Q. Did you abuse him any way out there on that Monday?

A. No, sir.

Q. You didn't see him on Tuesday, did you?

A. No, sir.

Q. Did you see him on Wednesday?

A. No, sir.

Q. All right, and we move to Thursday. I am talking about Thursday, July 12, 1962. Did you examine him over [fol. 314] long periods of time without rest on Thursday, July 12, 1962?

A. No, sir.

Q. What were the lengths of time, approximately? Did you question him some on Thursday?

A. About the longest test that I administered was approximately ten minutes.

Q. Ten minutes.

A. Yes, sir.

Q. And then was there a rest period in between the tests?

A. Yes, sir.

Q. How many tests did you give him, approximately, on Thursday?

A. I believe it was three.

Q. Three. How many did you give him on Monday, if you recall?

A. I believe it was four.

Q. Did you exert any force on the defendant to get him to take a test on Thursday?

A. No, sir, I did not.

Q. Did you threaten him in any way to get him to take a test on Thursday?

A. No, sir.

Q. Did he object to taking the test on Thursday?

A. No, sir, he did not.

[fol. 315] Q. Did you put your hand under his chin and say, "Look up at me, you black s.o.b," and then slap him on Thursday?

A. No, sir.

Q. Did you hit him with your fist in the stomach or with anything else in the stomach on Thursday?

A. No, sir.

Q. Did you knock him to the floor on Thursday?

A. No, sir.

Q. On Thursday, I am talking about, or any other time?

A. No, sir.

Q. Were you using coercion or force or threats or persuasion trying to get him to make a confession on Thursday?

A. No, sir.

Q. Did you abuse this man in any way on Thursday or any other time?

A. No, sir.

Q. Did you say to him on Thursday he couldn't leave until he confessed?

A. No, sir.

Mr. Smith: Pass the witness.

[fol. 316] Cross-examination.

By Mr. Legg:

Q. Of course he denied to you that he knew anything about the death of his wife, didn't he?

A. Yes, sir.

Q. He denied that to you on Monday and again on Thursday, didn't he?

A. Yes, sir.

Q. You did talk to him in connection with the tests and, of course, otherwise, too.

A. Yes, sir.

Q. How long did you talk to him on Monday, aside from the tests?

A. Outside of the tests themselves?

Q. Yes,

A. I don't exactly recollect the length of time that I talked to him.

Q. All right, you don't know how many times you talked to him or for how long?

A. No, sir.

Q. How many tests did you give him on Monday?

A. I gave him four tests.

Q. Four tests?

A. Yes, sir.

[fol. 317] Q. Is that standard procedure?

A. Well, yes, sir.

Q. Sometimes you just give one?

A. Very seldom.

Q. Sometimes just two? I am just asking—

A. The standard procedure that is used is—generally, we use two standard R & I tests and one card test.

Q. And there was one additional test given?
A. There was one additional standard R & I test.
Q. All right. You felt that was necessary in this case?
A. Yes, sir, I did.
Q. Now, then, that was all on Monday?
A. Yes, sir.
Q. On Thursday then what time did you first see him? You remember?
A. I will have to look at my records here and see. The first test was started at approximately 9:42 A.M.
Q. 9:42?
A. Yes, sir.
Q. And how many tests did you give him that day?
A. Three tests.
Q. Three tests?
A. Yes, sir.
Q. All right. How long did it take?
[fol. 318] A. The entire length of the tests?
Q. Questioning, yes.
A. On that particular test?
Q. Yes. Well, just your best estimate.
A. About seven minutes, I believe.
Q. For the three tests, you mean?
A. No, sir. We administer—I gave one first of these standard R & I tests. It started at 9:42; then at 10:17 I started another one. Of course, the first test lasted about seven or eight minutes, the best I recollect, and he had a rest period in there between there, and I started the second test at 10:17 A.M., and he had a rest period, and I started the next one at 10:59 A.M.
Q. All right, and how long did the one at 10:59—when did you get through with him is what I am trying to get straight?
A. I ended the last test at 11:09 A.M.
Q. And then did you talk to him more after that?
A. Yes, sir.
Q. For how long?
A. I believe I talked to him, the best I can recollect, about ten or fifteen, maybe twenty minutes, after that.
Q. After you finished the test?
A. Yes, sir.

[fol. 319] Mr. Smith: Ten or fifteen minutes. Is that what you said? I didn't hear you.

The Witness: After the last test, yes, sir.

All right. Now, if Mr. Wood said at 11:45 he was in there with you, well, then, you wouldn't quarrel with that.

A. Sir?

Q. If Ranger Wood testifies that at 11:45 he was in the polygraph room with you, why, you wouldn't dispute that, would you?

A. At 11:45?

Q. Yes, sir.

A. He possibly was; I don't recollect. We were in and out.

Q. I see. All right. Now did you talk to him any more that day?

A. Yes, sir, that evening.

Q. How many times?

A. I don't recollect right offhand.

Q. You don't recall for how long you talked to him on any of those occasions?

A. I, myself, never talked to him very long or any length at at any time.

Q. You remember what you told him Thursday afternoon when you talked to him?

[fol. 320] A. At which particular time, or is there any——

Q. Well, now, you said you didn't remember how many times.

A. Well, I don't.

Q. Of course, I suppose your conversations with him was sort of repetitious, wasn't it, saying the same thing?

A. Yes, sir, in a sense of speaking, it is repetitious as to the course of examination I had administered to him.

Q. All right, and did you talk to him about the fact that he ought to sign a statement?

A. I never told him that he ought to sign a statement or anything.

Q. Did you tell him that you knew he had killed his wife?

A. I told him that in my opinion or according to his examinations that he had done this, and that it was best to tell the truth about it:

Q. Well, why was he kept out there from 11:45, or when-

ever you finished the last test, why was he kept on out there the rest of the day?

A. You mean after I had finished the examination?

Q. Yes, sir.

A. Well, the officers brought him out there.

Q. I know.

A. I didn't have anything to do with keeping him out there.

[fol. 321] Q. You didn't?

A. No, sir.

Q. You don't know why he was kept out there the rest of the day?

A. Well, they were talking to him.

Q. But you weren't talking to him about making a statement.

A. Well, I don't quite get the drift of the question there.

Q. Just like I asked you awhile ago, Mr. Reed. Did you talk to him about making a statement or not?

A. I talked to him about telling the truth about what occurred. Now—whether he—he never did—he never made a statement to me at all.

Q. When was the last time you talked to him that day? Do you remember?

A. No, sir, I do not.

Q. All right.

A. Outside of what my examinations show, I have no recollection of time or specific times of that day.

Q. All right. Now did you see him at all on Wednesday, July 11th?

A. No, sir.

Q. Did you at any time use any physical force against him?

[fol. 322] A. No, sir.

Q. Did you ever threaten him in any way?

A. No, sir.

Q. At what time did he leave out there at the Department of Public Safety building on Thursday? Do you remember?

A. I couldn't tell you that.

Q. You know what time he left on Monday?

A. No, sir, I sure don't.

Q. Well, was it late, early, nighttime, daytime?

A. Seems like it was in the evening, but I just don't have any record of that particular time.

Q. You just don't know?

A. No, sir.

Q. Then you don't recall what you said to him during the times you talked to him other than what you have said here?

A. Well, it was just repetitious talking that we did. It was asking him to tell the truth about what occurred.

Q. Without asking you the results of any of those tests, there was some inconsistency in the results of those tests, was there not?

A. Inconsistency?

Q. Yes.

A. As far as the tests were concerned?

[fol. 323] Q. Yes.

A. Well, of course, I would have to get deep down into it to explain——

Q. Well, of course, you know we can't go into the results of the tests, and I don't want to.

A. I know that, yes, sir.

Q. But at any rate, you did give him seven of the tests,——

A. Yes, sir.

Q. —according to your testimony.

A. For different reasons.

Q. I see.

Mr. Legg: I believe that is all.

Redirect examination.

By Mr. Smith:

Q. Mr. Reed, did you ever talk to this defendant for an hour or an hour and a half at one time on Monday? Consistently talk to him for an hour to an hour and a half?

A. No, sir.

Q. What was the longest you ever talked to him? I am not talking about the tests now, I mean visiting with him Monday afternoon, the 9th. What would be the longest period of time, the very most, you talked to him yourself?

A. Approximately thirty minutes, I imagine.

Q. Was there a rest period after that?
[fol. 324] A. Yes, sir.
Q. And on Thursday what would be the very longest you could have talked to him at one time, Thursday afternoon? I am not talking about during the tests; I mean the other times.
A. Maybe ten or fifteen minutes at the longest.
Q. All right, was there a rest period after that?
A. Yes, sir.
Q. Did you ever see the defendant after he was brought over here to the county jail the next week? Did you ever see him any more after Thursday?
A. No, sir.
Q. Until today?
A. No, sir.
Q. You never did see him here at the county jail?
A. No.

Mr. Smith: That's all.
Mr. Legg: No further questions.

[fol. 325] Herman Wicker, called by the State as a witness in rebuttal of testimony presented by the Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows, after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. Herman Wicker.
Q. Your employment, sir?
A. Police department, City of Midland.
Q. Were you so employed back in July, 1962?
A. Yes, sir, I was.
Q. Mr. Wicker, I call your attention to Sunday, July 8th, 1962, and ask you, sir, if you had occasion to see Marvin Clewis, the defendent in this action, on that date.
A. I did.
Q. Let me ask you this: how tall are you?
A. I am six two-and-one-half.
Q. About how much do you weigh?

A. About two twenty.

Q. Do you smoke a pipe from time to time? Did you at that time?

A. Not any more. I did at that time; yes, I did.

[fol. 326] Q. All right, you are a big man with a pipe, I believe the way the thing is called here. Did you question this defendant here for long periods of time on that Sunday?

A. No, sir, I did not.

Q. Did you question him at all on that Sunday?

A. No, sir, I did not.

Q. Did you abuse him in any way on that Sunday?

A. No, sir, I did not.

Q. Did you coerce him?

A. No, sir.

Q. Threaten him?

Q. What time of day was it on that Sunday? Do you have

A. No, sir.

any idea, approximately?

A. Oh, between 3:30 and 4:00 o'clock.

Q. You didn't see him around midnight or anything of that nature, did you?

A. No, sir.

Q. You didn't question him at midnight?

A. No, sir.

Q. All right, what about Monday? Monday night did you see this defendant?

A. Yes, I did.

Q. And about what time was that?

[fol. 327] A. Oh, around 7:30 or 8:00 o'clock. I don't recall the exact time.

Q. P.M.?

A. P.M., yes, sir.

Q. Did you question him at that time?

A. No, sir, I did not.

Q. Did you coerce or threaten him in any way that night?

A. No, sir, I did not.

Q. Were you trying to get him to make a confession at that time?

A. No, sir.

Q. All right, were you questioning him around midnight that Monday night?

A. No, sir.
Q. Or two or three o'clock in the morning?
A. No, sir.
Q. That would be Tuesday morning, the 10th.
A. No, sir.
Q. Did you see him have some food on Monday night?
A. Yes, I did.
Q. This is in the city jail, of course.
A. In the detective office there upstairs next to the city jail.
Q. All right. Now, on Tuesday. Did you see the defend-
[fol. 328] ant any on Tuesday?
A. No, sir, I did not.
Q. You didn't see him at all and didn't talk to him?
A. No, sir, I did not see him at all.
Q. You didn't coerce or threaten him or any of that sort of thing?
A. No, sir.
Q. All right, sir. Did you see this defendant any more? Did you see him on Thursday?
A. Yes, I did.
Q. Thursday?
A. Uh huh.
Q. Do you have any idea what time it was on Thursday?
A. Oh, about 9:30 or 10:00 o'clock P.M., Thursday night.
Q. Did you coerce him in any way on that Thursday night?
A. No, sir.
Q. How long did you talk to him?
A. Oh, about twenty or thirty minutes.
Q. All right, sir. Were you trying to coerce and persuade him to get a confession out of him?
A. No, sir.
Q. All right. Did you ever refuse him food or rest or anything of that nature?
[fol. 329] A. No, sir.
Q. Did you ever abuse him in any way?
A. No, sir.
Q. Ever?
A. No, sir, I never did.

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Cross-examination.

By Mr. Legg:

Q. What kind of food, Mr. Wicker, did you see him have Monday night?

A. He had some soup. It was canned soup that was brought in by the trusty there at the city jail, and also a quart of sweet milk.

Q. How did you happen to know about that?

A. He was sitting in the back office of the detective—we have three offices there and there is a little office in the back and he was sitting at the desk, and the trusty brought the soup in, warmed it up, and put it in a bowl and brought it in, and he sat there at the desk and ate while I sat in the other office.

Q. He was back there in that office for questioning? Was somebody talking to him?

A. No, sir, he was not. It was past the supper hour, about 7:30 or 8:00 o'clock, and had already fed the jail, and [fol. 330] they had brought some soup in and milk, and he was just placed back there at this desk, and he was sitting there at the desk eating.

Q. Is that the only time you saw him eat?

Q. Beg your pardon?

Q. Is that the only time you saw him do any eating, I suppose?

A. Yes, sir, that is the only time I saw him eat.

Q. And you don't know whether he ate Sunday or Monday after that time, or anything?

A. No, sir, I do not.

Q. All right. Now, what did you talk to him about Thursday?

A. Thursday night?

Q. Yes, sir.

A. Just generally, just talked to him familiarize myself with him and the case; just visit with him about whether or not he killed his wife and what the circumstances were.

Q. Did you say anything to him about making a statement?

A. He had made a statement previously that I knew about and I asked him about it.

Q. He had made one statement previously?

A. Beg your pardon?
Q. He had made just one statement before that?
[fol. 331] A. Only one I know of.
Q. And later made a second one?
A. I don't know that
Q. What are your hours that you work?
A. At the present time or then?
Q. Then.
A. Sir?
Q. Then, yes, sir.
A. It was three until eleven.
Q. Three to eleven at night?
A. Yes, sir, in the evening.
Q. Now, on Sunday night and Monday night, of course, you were working from three until eleven. That right?
A. Yes, sir, I was.
Q. But you didn't talk to him at all?
A. Monday night, the early part between 7:30 and 8:00, while he was eating, and I didn't talk to him any more than just—while he was eating there I didn't question him. Sunday night I didn't see him at all; saw him Sunday afternoon.
Q. But you had seen him that afternoon, and you knew he was there?
A. Yes, sir, I knew he was there.
Q. Why didn't you talk to him?
[fol. 332] A. I had no reason to talk to him. I was busy on some other cases.

Mr. Legg: I have no more questions.

Redirect examination.

By Mr. Smith:

Q. Did you ever see the defendant after he was brought over here to the county?
A. No, sir.

Mr. Smith: We have no further questions.
Mr. Legg: That is all.

WAYNE GIDEON, called by the State as a witness in rebuttal of testimony presented by the Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. Wayne Gideon.
Q. What is your employment?
A. Detective with the Midland Police Department.
Q. Were you so employed in July, 1962?
A. I was.
[fol. 333] Q. Do you know the defendant, Marvin Clewis, seated over there?
A. I do.
Q. Wayne, I have to ask you this question. I am not trying to embarrass you in any way. There has been an officer referred to as a tall officer with a lump or knot on the side of his head. Now I want to get this in the record. How tall are you, please, sir?
A. I am six three.
Q. You have a lump on the side of your head?
A. Yes, sir.
Q. All right. Now then, I ask you sir—I am referring to Sunday, July 8, 1962; Sunday, July 8, 1962. Did you question this defendant for an hour or hour and a half on that day?
A. No, sir.
Q. Did you ever see this defendant on that day?
A. No, sir.
Q. You weren't around him at all?
A. No, sir.
Q. Did you force him to sign a waiver to take a polygraph on that Sunday, July 8th?
A. No, sir.
Q. Did you see the defendant on Monday, July 9th?
[fol. 334] A. I did, sir.
Q. And did you go out to the grave north of town here, to a hole in the ground out here north of town early Monday morning with this defendant?
A. No.

Q. All right, where did you see him?

A. I first saw him around 8:30 A.M. on the morning of the 9th. Sgt. Jesus Morales brought him in my office.

Q. All right, did you question him for prolonged periods of time at that time?

A. I didn't.

Q. Did you threaten him or coerce him or abuse him in any way at that time?

A. No, sir.

Q. Did you see him there at the DPS?

A. I did, sir.

Q. Here in Midland? Did you talk to him some out there, question him in any way?

A. I did not question him.

Q. Any at all on that Monday, that you can recall?

A. Yes, I guess you would have to say I questioned him. I talked to him about——

Q. How long a period of time?

A. Oh, two or three minutes.

[fol. 335] Q. Is that all?

A. Yes, sir.

Q. Did you threaten or abuse him during those two or three minutes that you talked to him?

A. No, sir.

Q. Try to force a confession out of him during those two or three minutes you talked to him?

A. No, sir.

Q. And that is all you talked to him on Monday, July 9, 1962. Right?

A. Well, I transported him back from the Department of Public Safety to the police department.

Q. All right, did you question him during that period of time?

A. No.

Q. Did you abuse him any during that period of time?

A. No.

Q. Did you threaten him?

A. No, sir.

Q. Or coerce him?

A. No, sir.

Q. Did you see this defendant on Tuesday, the next day, July 10th?

A. No.

[fol. 336] Q. Did you question him for long periods of time on Tuesday, July 10th?

A. No.

Q. Did you ever see this defendant after he was transferred to the county jail here? Did you ever see him any more?

A. No, sir.

Q. Did you abuse this defendant in any way?

A. No, sir.

* * * * * * *

Cross-examination.

By Mr. Legg:

Q. What hours did you work, Wayne,——

A. Beg your pardon?

Q. What hours did you work back at this time in July?

A. I was filling in for the captain of detectives. He was away on vacation, and I worked from eight in the morning until five in the afternoon?

Q. Of course, you sometimes work, I suppose, regular hours in your business, don't you?

A. Yes.

Q. Did you go out to the place northwest of town here when they took Marvin out there?

A. No, I did not.

Q. You were not along at that time?

[fol. 337] A. No, sir.

Q. And you never did really question him about this case then. Is that your testimony?

A. Well, I guess you would have to say I questioned him when he was admitting it to the officers orally.

Q. Where was that?

A. At the DPS. I was around. I was in and out of there, Mr. Legg.

Q. Did you take any statement from him?

A. No.

Q. You didn't type one up?

A. I typed one, yes.

Q. From what? From what he told you?

A. Sir?

Q. From what he told you?
A. No, sir, from a written pad.
Q. When was that?
A. It was on the 9th.
Q. All right, and did he sign that statement?
A. Yes.
Q. You saw him sign that statement. Did you witness it?
A. Yes.
Q. Who did do the questioning in this case?
A. I beg your pardon?
[fol. 338] Q. Who did do the questioning in this case? Who was in charge of it?
A. Mostly Sgt. Jesus Morales and Mr. Burl Reed, the polygraph examiner.
Q. Anybody else to your knowledge that questioned him?
A. Well, Sgt. Wood of the Texas Rangers was present.
Q. Did he question him while you were out there?
A. No. Well, he talked to him at different times, but as far as——
Q. You weren't in there when he talked to him?
A. Well, I was listening to part of it on the monitor.
Q. Do you know anything that Sgt. Wood said to him?
A. Just general interrogation, I guess, Mr. Legg. He was just asking different kinds of questions about how he killed her, and so forth.
Q. Of course, Marvin was denying that at the time, wasn't he?
A. I beg your pardon?
Q. Marvin Clewis was denying that he killed her during that time, wasn't he?
A. No, not during this time.
Q. Not during any time that you listened to Ranger Wood on the monitor?
A. The first morning I was there I saw Mr. Clewis shortly [fol. 339] before noon and he was in the polygraph room, and it was during a brief recess and he was drinking a coke or soft drink and smoking a cigar, and I talked to him and I asked him how he was doing and he said, "I'm doing fine," and so I left. The polygraph examiner was comparing his charts.
Q. Well, I understand all of that. I am not asking you

about that. I am talking about the time when you listened to the Ranger talking to him on the monitor.

A. This was later in the afternoon. I left there and I returned later that afternoon, and Marvin had admitted the offense and was giving the officers the details.

Q. Did you listen to any of the other interrogation on the monitor?

A. Well, I saw part of it and I listened to part of it.

Q. It is one of those things you can look in, wasn't it?

A. Yes.

Q. All right, did you hear Marvin at any time, I mean prior to late in the afternoon—you did hear him deny that he knew anything about his wife being killed, or anything like that, didn't you?

A. In the early part of the morning?

Q. I believe you said you didn't see him until noon.

A. They brought him in my office that morning, the first morning, around 8:30 A.M.

[fol. 340] Q. Now I am talking about out here at the DPS, when you said you were listening to things, and so forth. But you did hear him deny, of course, out there to those people who were questioning him that he killed his wife, didn't you?

A. Yes, I did hear him deny it.

Q. And he continued to do that throughout most of the afternoon. Isn't that right?

A. Mr. Legg, I don't know for sure.

Q. You don't know what time it was when you typed this statement up?

A. Yes, yes, I remember that. I am going to guess and say around five P.M. that afternoon.

Q. Until just prior to that time or a short time prior to that, you never had heard him admit anything that he had anything to do with his wife's killing or death, did you?

A. Mr. Legg, I don't know what time he first admitted it. I did hear him deny it, but there was one statement made and there was some letter that was not to Mr. Clewis' satisfaction in the confession and he asked that it be retyped, and I retyped the confession.

Q. Now, do you know whether or not on Sunday and Monday Marvin Clewis had anything to eat at the city jail?

A. He certainly did.

Q. What did he have?

[fol. 341] A. Well, on Monday, more particular,—Sunday I can't say about, Mr. Legg. I wasn't there Sunday, but I do know that each and every prisoner is offered regular jail food. However, on Monday, on the way to the station from the polygraph examination, he remarked to me that he would like to have some soup, that he had an ulcerated stomach. We stopped at a little grocery store on North Big Spring Street and Sgt. Jesus Morales went inside the store and bought him some soup and crackers, and we returned him down to the police department and we made arrangements with the lieutenant in charge of that particular shift to feed him this soup, because it is against our regulations for him to have anything outside of the——

Q. Well, now, this was after he made the statement?

A. That afternoon, yes.

Q. I said that this was after he had signed the statement.

A. Yes.

Q. All right, and you say you took him back to the police station?

A. Yes, sir.

Q. And then he ate it?

A. Yes, sir.

Q. What time of the night was that?

[fol. 342] A. Oh, I don't know. I am going to guess and say 5:30.

Q. Five thirty. Did you come over here to the courthouse with him?

A. Did I come to the courthouse with him?

Q. Yes.

A. I transferred him to the county jail.

Q. No, did you come over here with him when he appeared before the justice of the peace?

A. Yes, I did.

Q. About what time was that?

A. I don't remember exactly.

Q. Did you come right on down to the courthouse after you left the Department of Public Safety and then go to the police station?

A. No, we went to the police department. It has been so long I can't remember exactly, but my thinking is that we returned to the police department and Mr. Clewis ate and

we took him before the magistrate. I just don't know for sure which way we went first.

Q. Now, to your knowledge, on Monday, is soup and crackers all he had to eat——

A. No.

Q.—or all you saw him have to eat?

A. No.

[fol. 343] Q. What else?

A. That morning he had breakfast rolls and coffee.

Q. What time?

A. What time?

Q. Yes, sir.

A. 6:30 A.M.

Q. Were you there?

A. No.

Q. Well, you didn't see it then. You don't know whether he did or not.

A. No, but I asked him down in the office.

Q. From your own knowledge, all you know that he had to eat was that night after he had made the statement. Is that right?

A. Well, early in the day, out at the DPS, I don't remember exactly what time that was but in the early part of the afternoon, he had asked one of the boys in there, one of the officers, if he could have some milk, and I do know that Sgt. Victor Kuykendall left in our unit to go get him some milk.

Mr. Legg: I have no more questions of this witness.

Mr. Smith: That is all.

[fol. 344] Ray Robbins, called by the State as a witness in rebuttal of testimony presented by Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.

A. Ray Robbins.

Q. Your employment, please, sir?
A. Midland Police Department.
Q. And were you so employed in July, 1962?
A. Yes, sir, I was.
Q. All right, do you know Marvin Clewis, the man seated over there?
A. Yes, sir, I do.
Q. For the sake of the record, Mr. Robbins, how tall are you, please, sir?
A. Six four.
Q. Is your hair dark?
A. Yes, sir.
Q. Did you see this defendant, Marvin Clewis, on Monday, July 9th?
A. Yes, sir, I did.
[fol. 345] Q. Did you question him for a prolonged period of time, say from an hour to an hour and a half?
A. For about an hour, fifty minutes to an hour.
Q. All right, about what time was that, please?
A. From around ten until shortly before eleven.
Q. All right, sir, did you abuse him in any way?
A. No, sir, I did not.
Q. While you were talking to him, were you trying to persuade him to give you a confession at that time?
A. No, sir, I wasn't.
Q. Did you coerce or threaten him in any way at that time?
A. No, sir, I did not.
Q. After you finished talking to him, what happened to him? Was he taken to a cell and left there, or did somebody else start quesioning him, or what?
A. No, sir.
Q. What happened?
A. After we finished talking, he was put back in his cell. That was the last time I saw him that night.
Q. All right. You say that was between ten and eleven at night?
A. Yes, sir.
Q. All right, it was not two or three o'clock in the [fol. 346] morning?
A. No, sir, it was not.
Q. It was not past midnight?

A. No, sir.

Q. Did you see the defendant on Sunday, July 8th?

A. Yes, sir, I did.

Q. Did you interrogate him and question him over a prolonged period of time, an hour to an hour and a half?

A. No, sir.

Q. Did you interrogate him at all on Sunday?

A. No, sir, not on Sunday.

Q. You just saw him.

A. Yes, sir, that's correct.

Q. Was it late at night on Sunday or after midnight or when?

A. It was in the afternoon, not very long after I came on duty at three.

Q. I see. Did you abuse him in any way at that time?

A. No, sir, I did not.

Q. All right, we will move to Tuesday. Did you see the defendant on Tuesday at any time?

A. No, sir.

Q. You didn't question him over prolonged periods of time?

[fol. 347] A. No, sir.

Q. Didn't threaten him or abuse him at any time on Tuesday, July 10th?

A. No, sir.

Q. You didn't talk to him at all on Tuesday, I believe you said.

A. No, sir, I didn't.

Q. Did you see him any more after he was transferred over here to the county?

A. No, sir, I did not.

Q. County courthouse, county jail.

A. No, sir.

Q. Did you ever at any time abuse this defendant?

A. I did not.

Q. Did you ever at any time question him for prolonged periods of time trying to get him to make a confession?

A. No, sir.

* * * * * * *

Cross-examination.

By Mr. Legg:

Q. What were you questioning him about, Mr. Robbins? Is it Robbins?

A. Yes, sir.

Q. R-o-b-b-i-n-s.

[fol. 348] A. Yes, sir.

Q. All right, what did you question him about Monday night?

A. Monday night?

Q. Yes, sir.

A. Actually, there wasn't any interrogation to it. We just had a discussion about various things.

Q. Well, what things?

A. We talked about everything from his childhood days on to whether or not he believed in God.

Q. Was that the only time you talked to him?

A. That's correct.

Q. You never did question him any other time?

A. No, sir.

Q. You were on duty Sunday from three to eleven?

A. Yes, sir.

Q. And did you go off duty at eleven o'clock?

A. Yes, sir.

Q. Who did question him Sunday night?

A. Nobody to my knowledge, because nobody was working the late shift.

Q. Nobody was what?

A. Nobody was working out of our division on the late shift.

[fol. 349] Q. From three to eleven?

A. From eleven to seven.

Q. Eleven to seven.

A. Yes, sir.

Q. Well, during the time you were there, though, from three to eleven, who quesioned him?

A. On Sunday?

Q. On Sunday.

A. Morales was talking to him.

Q. When?

A. When we came on duty at three.

Q. And how long did he talk to him?

A. Oh, after we came on duty he probably talked to him for an hour and a half.

Q. Did you talk to him on Tuesday at all?

A. No, sir, I was off.

Q. You were off on Tuesday?

A. Yes, sir.

Q. Was that time your regular day off?

A. Yes, sir, Tuesday. Tuesday and Wednesday.

Q. Were you out at the Department of Public Safety at any time he was questioned?

A. No, sir, not during the questioning.

Q. Well, any time he was out there.

[fol. 350] A. Yes, sir, I was there on Thursday, I believe.

Q. On Thursday.

A. I went out and was out probably fifteen or twenty minutes during the time he was being brought back to the police station.

Q. What time was that?

A. It was in the late afternoon around 5:30 or 6:00 o'clock, I believe.

Mr. Legg: I have no more questions.

Redirect examination.

By Mr. Smith:

Q. Officer, you said Morales talked to him on Sunday. Did you say Morales talked to him for about an hour and a half? Is that what you said?

A. I believe that is right.

Q. During that hour and a half, did defendant have friends and relatives come to visit him while Morales was there?

A. Yes, sir, he had some people.

Q. So during this hour and a half, if I understood you correctly,——

Mr. Legg: Your Honor, we ask that the prosecutor not lead the witness.

[fol. 351] Mr. Smith: Oh, this is a non-jury sort of thing, your Honor.

Mr. Legg: I think the same rules apply.

Q. During this hour and a half, he did have visitors. Is that right?

A. Yes, sir, he did.

Mr. Smith: We have no further questions.

Recross-examination.

By Mr. Legg:

Q. Do you know of any other visitors he had while you were there?

A. Nothing except on that Sunday and then on Thursday —no, sir, just on that Sunday is the only ones I know about for sure.

Mr. Legg: Thank you.

Mr. Smith: That's all. Thank you.

Luis Salinas, called by the State as a witness in rebuttal of testimony presented by Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please.

[fol. 352] A. Luis B. Salinas.

Q. Your employment, please, sir?

A. With the Midland Police Department, as patrolman.

Mr. Legg: May I ask his name, please? I didn't get it.

Mr. Smith: Luis Salinas—S-a-l-i-n-a-s. L-u-i-s is his first name.

Mr. Legg. Thank you.

Q. Were you on the Midland police force in July 1962, sir?

A. Yes, sir.

Q. And I call your attention to Sunday, July 8th, 1962. Were you working at eleven at night to seven in the morning shift?

A. Yes, sir.

Q. What were your duties at that time on July 8th?

A. I was desk sergeant.

Q. Does that mean you have the keys to the jail?

A. Yes, sir.

Q. And I ask you, sir, do you know the defendant, Marvin Clewis, seated there?

A. Yes, sir, I saw him there.

Q. All right, sir. I ask you, sir, if he was ever put in his cell or taken out of his cell from midnight on. That [fol. 353] would be of midnight of Sunday and then the beginning of early morning hours Monday.

A. No, sir.

Q. All right, sir, and what were your duties on the following day? That would be Monday night at 11:00 P.M. until 7:00 Tuesday morning.

A. The same duties.

Q. All right, sir. Was this defendant either taken out of his cell or taken to his cell after midnight?

A. No, sir.

Q. Was he in his cell?

A. Yes, sir, he was in his cell.

Q. Both nights?

A. Yes, sir.

Q. Was he ever abused in any way that you know of?

A. No, sir.

Mr. Smith: We pass the witness.

Cross-examination.

By Mr. Legg:

Q. Of course, you don't have the only keys to the jail cells, do you?

A. Yes, sir, at that particular time; yes, sir.

Q. The detectives don't have any keys?

A. Not for that block cell, no, sir.

[fol. 354] Q. And you don't have an officer who can get the keys downstairs and be upstairs with them——

A. If a key goes upstairs——

Q. —and they be brought back to you later?

A. No, sir, not while I was on duty. I go up with the keys.

Q. You go up with the keys.

A. Yes, sir. Any time they wanted the keys, I have to go up with them.

Mr. Legg: All right. No further questions.

Mr. Smith: No further questions. Thank you.

L. O. Wright, called by the State as a witness in rebuttal of testimony presented by Defendant in his Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.

A. Sgt. L. O. Wright, Midland Police Department.

Q. Were you on the police department back in July of 1962?

A. Yes, I was.

[fol. 355] Q. I call your attention to Tuesday, July 10, 1962, and were you working the shift from eleven at night until seven in the morning?

A. Yes, I was.

Q. And what were your duties, please, sir?

A. Desk sergeant.

Q. Does that mean you have the keys to the jail?

A. Yes, sir.

Q. All right, I call your attention to Marvin Clewis seated over there. Do you know him?

A. Know him by sight.

Q. That is what I mean, yes, sir. Did you take him out of his cell any time after midnight, there is, midnight Tuesday night? Did you take him out of his cell at any time after midnight?

A. No, sir, I did not.
Q. All right, was he left in his cell from midnight on?
A. Yes, sir.
Q. Did you put him into his cell from midnight on, or was he just there?
A. I never did put him in or take him out.
Q. He was there, in other words?
A. Yes, sir.

Mr. Smith: Thank you. We pass the witness.
[fol. 356] Mr. Legg: I have no questions of this witness.

Garland Black, called by the State as a witness in rebuttal of testimony presented by the Defense in its Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. Your name is Garland Black?
A. Yes, sir.
Q. You are employed by the Midland Police Department?
A. I am.
Q. And you were in July, 1962. Is that right?
A. Yes, sir, I was.
Q. Officer Black, I call your attention to Monday, July 9th, and Tuesday, July 10th, 1962, and ask you, sir, if you were on duty there at the police station at that time.
A. Yes, sir, I was.
Q. On what shift? Day shift or——?
A. Came on at seven A.M. and worked to three P.M.
Q. All right, sir. I will ask you, sir, if you know Marvin Clewis seated over there?
A. Yes, sir.
[fol. 357] Q. All right, sir. I ask you, sir, if you had occasion to feed him food on Tuesday, July 11th.
A. Yes, sir, I did.
Q. Excuse, me, it is July 10th; Tuesday, July 10th. I am sorry. You did feed him in his cell.

A. Yes, sir.
Q. Was he abused in any way?
A. Not to my knowledge, no, sir.

Mr. Legg: I have no questions.
Mr. Smith: We pass the witness.

Q. (Mr. Smith) Officer Wright, you were on duty last night from eleven to seven this morning, weren't you?
A. Yes, sir.

Mr. Smith. Thank you.

(Witness excused)

LONNIE R. RICHARDSON, called by the State as a witness in rebuttal of testimony presented by the Defense in its Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. Would you state your name, please, sir?
[fol. 358] A. Lonnie R. Richardson.
Q. You are on the Midland Police Department?
A. Yes, sir.
Q. And you were back in July of 1962?
A. Yes, sir.
Q. I call your attention, sir, to Thursday, July 12th, 1962. Were you on duty that day?
A. Yes, sir.
Q. You know Marvin Clewis, the defendant seated over there?
A. Yes, sir.
Q. Did you have occasion to feed him in the afternoon of Thursday, July 12th, 1962?
A. Yes, sir.
Q. Food I am talking about. You fed him food.
A. Yes, sir.

Mr. Smith. Thank you, sir. Pass the witness.

Cross-examination.

By Mr. Legg:

Q. What time?
A. Oh, approximately seven o'clock P.M.
Q. Where?
A. In the cell at city jail.
Q. Is that the usual feeding time for prisoners?
[fol. 359] A. The usual feeding time is from five to five thirty.
Q. What did you feed him?
A. On the 12th I feed him tomato soup.
Q. Is that the only time that you fed him?
A. On that day.
Q. Well, did you feed him the day before?
A. Yes, sir, I did.
Q. What time?
A. Approximately the same time of day.
Q. It wasn't the usual feeding time?
A. No, sir.
Q. Why?
A. He was brought in at that time of the day.
Q. What about Tuesday?
A. I didn't have occasion to feed him on Tuesday.
Q. Did you feed him any Monday?
A. No, sir, I wasn't on duty.
Q. Or Sunday?
A. No, sir.

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[fol. 360] Cope Routh, called by the Defense in support of its Motion to Exclude and Suppress Confessions of the Defendant, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Legg:

Q. Mr. Routh, you are a reporter for the Midland Reporter Telegram?

A. That is right.

Q. Were you so employed back on July 10, 1962?

[fol. 361] A. Yes, sir.

Q. Let me ask you if on July 10, 1962, you had occasion to see Marvin Clewis seated to my right.

A. That's correct.

Q. And where did you see him?

A. In the detectives' office.

Q. Did you talk to him?

A. Yes, sir.

Q. Did you identify yourself as a newspaper reporter or not?

A. I don't believe I did.

Q. Was there any particular reason why Mr. Clewis would have thought you to be other than an officer or a police officer?

A. Probably not.

Q. Now I believe on that particular morning he repeated essentially the details of a so-called confession that he had signed the night before.

A. I never saw the confession.

Q. You never have seen it?

A. No, sir.

Q. All right, but did you get some of the details from some of the officers?

A. I am sure I did.

[fol. 362] Q. And you got some of the details from him.

A. That is correct.

Q. Now what was his appearance on Tuesday? Do you know about what time that was?

A. As I recall, it was around seven o'clock.

Q. In the morning?

A. Yes, sir.

Q. Now, what was his appearance?

A. Oh, I think all I can recall was that he was very unhappy appearing individual.

Q. Did his eyes appear to be bloodshot?

A. I don't recall.

Q. If you said in the story that you wrote that afternoon for the paper that "Marvin Peterson Clewis, 35 year old Negro pipeline worker, peered through bloodshot eyes early

Tuesday after spending a sleepless night in his bunk inside the city jail," why, then, that's the way it was, wasn't it?

A. I am sure it was.

Q. Now at that time, Mr. Routh, did the defendant, Marvin Clewis, tell you that he had been kept up all night one night by the police?

A. No, sir.

Q. Did he tell you that subsequently?

A. No, sir.

[fol. 363] Q. He never did make that statement to you?

A. No, sir.

Q. I thought you told me that he had.

A. No, he never mentioned anything about that.

Q. Now you wrote in that story that afternoon the details of the statement and the chronological order of the things that happened on Monday previously, and I believe you had a quote in there "just bring me some milk and I will give you a statement and sign it." Now, didn't Mr. Clewis tell you that or one of the officers tell you that?

A. I feel certain one of the officers told me that.

Q. Do you know which one?

A. No, sir, I don't.

* * * * * * *

[fol. 364] VICTOR KUYKENDALL, called by the State as a witness in rebuttal of testimony presented by the Defense in its Motion to Exclude and Suppress Confessions of the Defendant, testified as follows after first being duly sworn:

Direct examination.

By Mr. Smith:

Q. Your name is Victor Kuykendall?

A. Yes, sir.

Q. You are a policeman?

A. Yes, sir.

Q. Detective for the Midland Police Department?

A. Yes, sir.

Q. You were so employed in July, 1962?

A. Yes, sir.

Q. Do you know Marvin Clewis, the defendant seated over here?

A. Yes, sir.

[fol. 365] Q. Did you have occasion to see him on Sunday, July 8, 1962?

A. No, sir.

Q. And then you did not abuse him, threaten or coerce him in any way on that Sunday?

A. No, sir.

Q. Did you have occasion to see him on Monday?

A. Yes, sir.

Q. July 9, 1962. Did you interrogate him any on that day?

A. No, sir.

Q. Did you coerce him, threaten him, in any way whatsoever on that day, Monday, July 9th?

A. No, sir.

Q. Did you try to persuade him to make a confession on that day?

A. No, sir.

Q. All right, let's move to Tuesday, July 10, 1962. Did you see the defendant on that day?

A. Yes, sir.

Q. Did you talk with him on that day?

A. Yes, sir.

Q. What was the longest period of time you talked to him?

A. I would say between fifteen and twenty minutes.

[fol. 366] Q. How many times did you talk to him on Tuesday?

A. I believe it was twice.

Q. Did you ever abuse or threaten him in any way on Tuesday?

A. No, sir.

Q. Coerce him in any way?

A. No, sir.

Q. Mistreat him in any way or abuse him in any way?

A. No, sir.

Q. Did you use any coercion or persuasion trying to get him to make a confession on Tuesday?

A. No, sir.

Q. When you talked to him, was it during the daylight hours or nighttime hours?

A. Daylight hours.

Q. You didn't see him on Wednesday, I don't guess. You saw him again on Thursday?

A. Yes, sir.

Q. Just for a few minutes driving to the DPS. That right?

A. Yes, sir.

Q. That was in the daytime on Thursday, July 12, 1962?

A. Yes, sir.

Q. You didn't interrogate him any on that day?

A. No, sir.

[fol. 367] Q. Did you abuse or threaten him or anything on that day?

A. No, sir.

Q. Didn't try to get a confession, persuade him to make a confession on Thursday?

A. No, sir.

Q. Have you seen him any more until now?

A. No, sir.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. What time Tuesday was that that you talked to him?

A. I believe it was around eight or eight thirty in the morning.

Q. In the morning.

A. Yes, sir.

Q. Were you present at the time he talked to Mr. Cope Routh?

A. Yes, sir.

Q. And you talked to him after that. Is that correct?

A. Yes, sir, one time.

Q. I mean, after he finished talking to Mr. Routh, then you talked to him for a little while.

A. As soon as Mr. Routh got through talking to him, we [fols. 368-369] locked him back up, sir.

Q. All right. You were present, of course, at all times he was talking to Mr. Routh.

A. Yes, sir.

Q. You didn't talk to him on Sunday or Monday?

A. No, sir.

Q. And on Thursday you drove him to the DPS?

A. Yes, sir.

Q. Did you stay out there Thursday?

A. No, sir.

Q. What time was that Thursday, do you know?

A. Around eight thirty or nine o'clock, I believe.

Mr. Legg: Thank you.

Mr. Smith: That is all. Thank you.

Mr. Legg: Are you ready to hear argument on the Motion?

The Court: Yes, sir.

(Arguments by counsel representing the respective sides were then made to the Court, and at the conclusion of same the Court made its ruling as follows:)

ORDER OF COURT OVERRULING MOTION TO EXCLUDE AND TO SUPPRESS CONFESSIONS

The Court: The Court will overrule Defendant's Motion to Exclude in its present status.

Mr. Legg: Note our exception, your Honor.

[fol. 370]

Continuation of Trial of Case Upon its Merits

The Jurors Resume Their Seats in Jury Box

The Court: We will proceed with the trial of the case.
Mr. Smith: We will call Mr. Howell back on the stand.

GENE HOWELL, a witness for the State and who was previously duly sworn as a witness in the case and whose testimony commenced immediately preceding the Hearing of Motion of the Defendant, again takes the witness chair and continues testifying on Direct Examination upon the merits of the case, as follows:

Direct examination.

By Mr. Smith:

Q. Will you state your name, please, your full name?
A. Gene Howell.
Q. Gene Howell?
A. Yes.
Q. And I forget, but I think you testified these facts. What is your employment, sir?
A. Deputy sheriff, Midland County, Texas.
[fol. 371] Q. For the record, you are the same Gene Howell who was testifying before on the stand here. Is that right, sir?
A. That is right.
Q. I show you, Mr. Howell, what has been marked State's Exhibit 13, and I will ask you, please, sir, to examine it. (Hands document to the witness.) Can you identify it?
A. I can.
Q. What is it, please, sir?
A. It is a voluntary statement made to me by the defendant, Marvin Clewis, on July 17, 1962.

Mr. Legg: Object to the term "voluntary statement."
The Court: Overruled. Go ahead.

Q. Is the same Marvin Clewis who made State's Exhibit 13 to you on July 17, 1962, in the courtroom now?

A. Yes, sir, he is.

Q. Will you point him out, please?

A. He is the defendant sitting over there next to Mr. Legg, his attorney. (Points to the defendant.)

Q. I ask you this, Mr. Howell: did Mr. Clewis, the defendant, sign State's Exhibit 13 there in your presence?

A. He did.

Q. I ask you further, sir, if before Mr. Clewis gave you State's Exhibit 13 whether or not you first warned him that he did not have to make any statement at all.

[fols. 372-379] A. I did.

Q. And that any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement is made.

A. I did to that exact effect, yes, sir.

Q. Will you tell the jury, please, sir, whether or not Mr. Clewis made the statement freely and voluntarily.

A. Completely.

Q. Tell the jury, please, whether or not you forced him in any way to get him to make State's Exhibit 13.

A. In no way whatever.

Q. State whether or not you held out any promise of reward to get him to make State's Exhibit No. 13.

A. I did not.

Mr. Smith: The State introduces in evidence State's Exhibit No. 13.

Mr. Legg: Your Honor, let the record show that the defendant objects to the admission into evidence of State's Exhibit 13 for the reason that same was an involuntary statement.

* * * * * * *

[fol. 380] Cross-examination.

By Mr. Legg:

Q. Mr. Howell, from other testimony in this case from members of the office that you serve, there is evidence that Marvin Clewis was first seen by a deputy sheriff, Mr. Kirksey, on Saturday night, the 7th of July. Now

this statement is dated, I believe, July 17th. Is that correct?

A. That is correct, yes, sir.

Q. There is further evidence in this case that Mr. Clewis was taken into custody at six or six thirty on the early morning of July 8th by one officer Morales of the Midland Police Department, which was on Sunday morning, July 8th. Now, may I ask you this: from July 8th until July 17th had Marvin Clewis been in the custody of the sheriff's department of Midland County, Texas, at any time?

A. A portion of that time, yes, sir.

Q. All right, and when was he first delivered into the custody of the sheriff of Midland County?

A. On Friday afternoon, the 13th of July, 1962.

Q. On Friday, the 13th of July.

A. Yes, sir.

Q. All right, and—Friday afternoon you say?

A. That is correct.

Q. And he had remained here then Saturday, Sunday and Monday, in the county jail prior to making this statement?

[fol. 381] A. That is correct, yes, sir.

Q. But from Sunday until Friday afternoon he was in the custody of the Midland Police Department, to your knowledge?

A. That is my understanding, yes, sir.

Q. All right. Now, Mr. Howell, when you took this statement from Marvin Clewis, you knew, did you not, that two previous statements had been taken by police officers?

A. I had been told that.

Q. What time of the day was this statement taken?

A. Oh, I believe it was around between ten and ten forty-five that it was begun.

Q. And what time did you first see Marvin Clewis on that morning?

A. Around 9:30.

Q. Around 9:30.

A. Yes, sir.

Q. And where was it now that you then saw him and questioned him?

A. In the criminal division office of the sheriff's office.

Q. Now, Mr. Howell, at that time—incidentally, who was there besides you?

A. During the taking of the statement?

Q. From 9:30 on.

[fol. 382] A. Well, ——

Q. Well, let's say at 9:30.

A. At 9:30, Guy Fletcher.

Q. Guy Fletcher.

A. Yes.

Q. And did you and Mr. Fletcher talk to this defendant before you took that statement?

A. We did.

Q. Did he at first deny any guilt in connection with the death of his wife?

Mr. Smith: If it please the Court, this is now calling for a self-serving declaration.

The Court: Overruled. Go ahead.

Q. Go ahead, Mr. Howell. Did he deny any guilt in connection with the death of his wife?

A. He did.

Q. With which he had by that time been charged, had he not?

A. I believe so, yes, sir.

Q. Now, did you talk to him for some time after that?

A. I did.

Q. Did he still deny it?

A. For a brief time, yes, sir.

Q. Did he deny it until the time just prior to the time [fol. 383] you began taking the statement?

A. No, sir.

Q. How long then would you say that denial continued?

A. I would say it probably continued for a period of time. It wasn't said over a time or two, but it was during a period of some probably thirty or thirty-five minutes.

Q. All right, I believe you said you first brought him down and started talking to him at 9:30 and started taking the statement around 10:30 or 10:45.

A. Those are times approximately correct, yes, sir.

Q. All right. Now then, did he deny any implication until such time as he talked to another person?

A. No, sir, I can't say that.

Q. Did he during that period talk to any other law enforcement officer?

A. Prior to the beginning of the statement.

Q. And who was that?

A. I don't know whether you classify him a law enforcement officer or not. He talked to Mr. Mims.

Q. The district attorney?

A. Yes, sir.

Q. All right, and did he come to the sheriff's office and talk with him then?

A. He did.

[fol. 384] Q. Now, and after that was when Marvin Clewis made a statement to you.

A. That is correct, yes, sir.

Q. He had not made any statement prior to that time?

A. He had not.

Q. Now, Mr. Howell, did Marvin Clewis mention to you prior to the time that you took this statement and during the time he was in your custody in the sheriff's office anything about having been abused at the hands of any other officer since he had been taken into custody?

A. He mentioned it, yes, sir.

Q. Would you tell us the circumstances?

A. The circumstances as to the abuse?

Q. Well, did he tell you that he had been abused by other officers?

A. Yes, sir, he did.

Q. Did he name them?

A. Not by name.

Q. Well, did he identify them in any way?

A. Yes, sir.

Q. All right, would you tell us how?

A. Well, he said that one was the Mexican city detective, one was the big Texas Ranger, and one was the man who gave him the lie box test.

[fol. 385] Q. All right, did he tell you that threats had been made against him?

A. He said that there had.

Q. Did he tell you that he had been physically assaulted?

A. Yes.

Q. When he was talking to you about these things, did he seem anxious to tell you these things or was he reasonably reluctant to do so?

Mr. Smith: If it please your Honor, we would like to let our objection go to all this. It would all be classified as self-serving, and we believe not proper, sir.

The Court: All right.

A. He was not anxious. He said he hated to say these things.

Q. I believe you told me yesterday that he was reluctant to talk about any of it actually.

A. Yes, sir.

Q. But he did tell you those things and he did tell them to you on the 17th of July.

A. Yes, sir, he did.

Q. Of 1962.

A. That is correct.

Q. Now at whose direction did you question this defendant on that date?

[fol. 386] A. Well, it was at the direction of Sheriff Ed Darnell.

Q. Of the sheriff.

A. Yes.

Q. All right, and are these words that Mr. Smith read the words of Marvin Clewis?

A. To the very nearest way I could put it on paper, yes, sir.

Q. Of course, you would ask him some questions about it and he would answer. Is that correct?

A. That is correct, yes, sir.

Mr. Legg: No further questions.

Redirect examination.

By Mr. Smith:

Q. Mr. Howell, do you know of your own knowledge whether this man was abused in any way prior to your seeing him?

A. I do not know, no, sir.

Q. Was a Texas Ranger present when he gave you State's Exhibit 13?

A. No, sir.

Q. Was there a detective from the police department present when he gave you State's Exhibit 13?

A. There was not.

Q. Was there a lie detector man present when he gave you State's Exhibit 13?

[fol. 387] A. There was not.

Q. When the defendant told you that he had been abused, what did you say to him before you took this, then?

A. I told him that regardless of what might have happened in the past and regardless of what he might want to say or do now, that no harm and no abuse of any form would come to him at all.

Q. All right, sir. Did he make a request to you concerning a telephone call ——

A. Yes, sir.

Q. —to see someone?

A. Yes, sir, he said he would like to talk to someone.

Q. What happened then?

A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.

Q. All right, what happened?

A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time.

Q. Did you see any signs of abuse at all concerning the defendant when you were talking to him about State's Exhibit 13?

[fol. 388] A. Absolutely none.

Q. Approximately how long did Mr. Mims talk to the defendant on this occasion?

A. Oh, three to five minutes.

Q. Then did Mr. Mims stay or did he leave?

A. He left.

Q. And whom did that leave then in your office there? Who was present then?

A. Chief deputy Guy Fletcher and I, along with the defendant.

Q. I beg your pardon?

A. Along with the defendant.

Q. Yes. Do you recall whether or not defendant had any coffee that morning?

A. Yes, sir, he did have.

Q. In your office there?

A. Yes, sir.

Q. Tell the jury whether or not you mistreated this defendant in any way.

A. In no way whatever.

Mr. Smith: We pass the witness.

[fol. 389] Recross-examination.

By Mr. Legg:

Q. Of course, you have stated to the jury, Mr. Howell, that you warned this defendant and that you talked to him and I believe you said that it was completely voluntary. So far as anything you did, it was, wasn't it?

A. That is correct, yes, sir.

Q. Of course, you have no way of knowing about anything that might have happened before or whether it might be influencing his mind or influencing what he did at all, do you, sir?

A. I couldn't say about that.

Q. All right. Now, did you mention to him the possibility of giving him any other kind of tests or anything like that during the time that he was denying his guilt?

A. Yes, sir, I did.

Q. During the time he was in the county jail, I believe you said you asked him if he wanted you to contact someone for him when he said he would like to talk to somebody, and, so far as you know, he didn't have an attorney at that time, did he?

A. Not to my knowledge, no, sir.

Q. All right, and during the time that he was in the county jail, from Friday to whatever day it was that you [fol. 390] took this statement — I believe it is July 17th——

A. That's right.

Q. —did any lawyer contact him or confer with him at any time while he was in the county jail?

A. Not to the best of my knowledge, no, sir.

Q. You would have permitted a lawyer to do so, of course, though,——

A. Absolutely.

Q. —if one had come over here, wouldn't you have, sir?

A. Yes, sir.

Q. During your experience as a law enforcement officer, Mr. Howell, in Midland County and working for the sheriff's office, have you ever had any trouble with Marvin Clewis?

Mr. Smith: If it please the Court, that question is clearly improper. It is not the proper way to test the reputation of the defendant at all. It is clearly improper.

The Court: Sustained.

Q. Are you acquainted, Mr. Howell, with Marvin Clewis' reputation as a peaceable, law-abiding citizen?

A. From our records.

Q. Yes, sir.

A. Or lack of records.

Q. I am talking about of your own personal knowledge are you acquainted with his reputation.

[fol. 391] A. To some degree.

Q. All right. Do you think that you could express an opinion as to his reputation as a peaceable, law-abiding citizen, insofar as the criminal law is concerned?

A. I don't know of any law violations.

Mr. Legg: I believe that is all.

Redirect examination

By Mr. Smith:

Q. Mr. Howell, concerning his stay in the county jail, tell the jury whether or not he was treated like any other prisoner while he was in the county jail.

A. Absolutely.

Q. Were you on duty on that weekend, Saturday and

Sunday, before this Tuesday the confession was given, the statement was given?

A. Yes, sir, that was my duty weekend.

Q. Would you tell the jury whether or not, please, church people came to the jail on Sunday?

A. Yes, sir, they did.

Q. Did they hold services?

A. Yes, sir.

Q. Would you tell us, please, whether or not Marvin Clewis participated in the services in a group capacity.

A. In a group capacity, yes, sir.

[fol. 392] Mr. Smith: We have no further questions.

Recross-examination.

By Mr. Legg:

Q. Of course you never had questioned him on Sunday morning. I believe you didn't see him at all to talk to him and nobody else didn't until Tuesday morning, to question him.

A. I didn't talk to him. I saw him during the church services and during the serving of meals, which, when you are the duty officer, that is your purpose during the weekend.

Q. Yes, sir.

A. I said nothing to him, no.

Q. No other officer questioned him either during that period of time, so far as you know.

A. I am sure they did not.

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[fol. 393] GEORGE CONE, called by the State as a witness in the trial of the case upon its merits, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

* * * * * * *

[fol. 394] Q. All right, sir. I ask you, please, Mr. Cone, if you were on the grand jury in September of 1962 in Midland County, Texas?

A. Yes.

Q. I will ask you, please, sir, if the grand jury investigated the death of one Dorothy Mae Clewis.

A. Yes.

Q. And did the grand jury diligently look into the matter to determine the cause of death of Dorothy Mae Clewis?

A. Yes.

Q. They talked to all the witnesses they could think of concerning the matter?

A. That is true.

Q. What was the conclusion of the grand jury as to the cause of death?

Mr. Legg: Now, your Honor, we want to object to any conclusion of the grand jury as to cause of death.

Mr. Smith: Your Honor, the indictment has to be proved. This is the only way to prove it as to what the grand jury felt the cause of death was, as represented in [fols. 395-397] the indictment. We have to prove the indictment, and this is for the sole purpose of proving the indictment.

Mr. Legg (To Smith): Was this in relation to by means of the cause being unknown you are talking about?

Mr. Smith: Yes.

Mr. Legg: All right.

Mr. Smith: You withdraw your objection?

Mr. Legg: Oh, yes.

Mr. Smith: O.K.

A. We determined that, or we could not determine the exact cause of death and, as I remember it, the indictment read "causes unknown."

Q. Did it also mention about choking with a belt?

A. Yes.

[fol. 398] Dr. Martha Madsen, called by the State as a witness in the trial of the case upon its merits, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Would you state your name, please, ma'am?

A. Martha Madsen.

Q. Your profession or calling, please, ma'am?

A. I am a pathologist.

Q. Would you tell the jury briefly, please, what a pathologist is?

A. A pathologist is a speciality in medicine that has to do with the causes, the effects, of disease, and the diagnosis of disease, and a pathologist essentially performs or is in charge of laboratory tests and performs surgical tests and performs autopsies.

Q. Performs autopsies. Briefly, what is an autopsy, please?

A. An autopsy is a complete examination of the body after death.

Q. All right. What qualifications and training do you have, please, ma'am, for your profession?

A. I am a specialist in pathology, Diplomat of the Amer-[fol. 399] ican Board of Clinical Pathology and Pathologic Anatomy.

Q. A little slower, please, ma'am.

Mr. Legg: We didn't hear it.

Q. We didn't catch it.

A. I have a specialty degree in Pathology.

Q. What other prior training, please, ma'am?
A. That includes five years of postgraduate training following an M.D. degree.
Q. Following the M.D. degree?
A. That's right.
Q. You have an M.D. degree.
A. Yes.
Q. And then you have this additional training.
A. Uh huh.
Q. And are you licensed to practice in Texas, please, ma'am?
A. Yes.
Q. How long have you been in Midland, please?
A. Since 1953.
Q. All right. Now, Dr. Madsen, I call your attention to July 5, 1962, and ask you, please, ma'am, did you examine some bones or the remains of a body that had recently been dug up?
A. Yes, on July 5, 1962, about 3:00 P.M., a large amount [fol. 400] of wet sand in which were a number of bones was brought to the Newnie Ellis Funeral Home, and they were examined by me.
Q. Would you tell the jury, please, what you observed and your conclusions and so forth?
A. Most of the bones were completely separated. They were removed from this sand in which were many bugs——
Q. A little bit slower, please, ma'am.
A. They were removed from this sand in which there were many bugs. There was complete decomposition of the soft tissues of the body, except for a small amount of mummified skin that covered part of the skull, and also a small amount of decomposed brain in the skull. We attempted to place these bones in the correct position and then made a number of measurements of the length of the bones, condition of the bones, and so on.
Q. All right. Could you determine the race of the body?
A. Yes, the skull, as I said, was covered by a small amount of mummified skin. On microscopic examination this was shown to have brown pigment; also, there were a few black, kinky hairs in this skin, so we felt pretty sure this was a Negro.

Q. Could you arrive at, roughly, the size of the——

A. We felt from our measurements and the length of the bones and so on that the body was approximately five [fol. 401] two to five four in length and weighed approximately 115 pounds and, as I state, this is a very gross approximation, especially on the weight.

Q. On the weight?

A. Uh huh. We felt that this was a female and probably between twenty-five to thirty years of age, or thirty-five.

Q. These were all approximations from the bones and remains.

A. Yes.

Q. Now then, ma'am, did the skull have teeth in it?

A. Yes, the skull had a number of teeth and some gold teeth. There was quite a bit of gold dental work,——

Q. All right.

A. —and this was turned over to a dentist.

Q. Now then, assuming that the bones or remains, however we can refer to this,—assume that a set of bones or remains in the same condition as you found these that you examined had been in a shallow grave, sandy soil, partially shaded in the late afternoon from the sun, and had been found on July 5, 1962, what would be your estimate as to how long the body would have been so interred?

A. Because of the partial shade to the grave, especially from the afternoon sun, we felt that this could have been here for about six months, could have been a person in [fol. 402] the grave for about six months.

Q. Could you determine the cause of death from what you could examine there?

A. No.

Q. Did you notice whether or not there were any skull fractures or anything of that nature?

A. There were no skull fractures.

Q. What would be the difference, Dr. Madsen, if any, in a person being choked by the hands and being choked by a belt?

A. Being choked by a belt produces more uniform and complete pressure all the way around, so that both the trachea, that is, the windpipe, and the large important

vessels to the head would be compressed, and it would be a surer way to producing death by asphyxiation.

Q. And could this set of bones that you examined met its death by choking?

A. It could have, but there was no way of ruling it in or ruling it out.

Mr. Smith: We pass the witness.

Cross-examination.

By Mr. Legg:

Q. Dr. Madsen, the business that you have talked about with reference to choking a person with a belt and choking with the hands, of course there wasn't anything here, even [fol. 403] if you knew this person had been choked, that would give you any clue as to how they had been choked insofar as the skull or any bones were concerned, was there?

A. No. As I stated, I could not tell what the cause of death was.

Q. I mean whether you differentiated between them.

A. Yes.

Q. You couldn't tell from the things you saw——

A. No.

Q. —whether that person had been choked or not.

A. No.

Q. Certainly you couldn't have told whether it had been choked with a belt or choked by the hands or anything like that.

A. No.

Q. Or whether it had been shot or whether the person had been poisoned or run over by a car, unless you found broken bones.

A. If shot, we may have found some gunshot wounds, which we did not.

Q. Of course, there could have been broken bones in this particular corpse and you couldn't have told because, as you said, they were completely separated, weren't they?

A. Where the bones were separated we wouldn't be able [fol. 404] to tell dislocations, but we should be able to tell fractures.

Q. You could have told fractures.

A. Yes.

Q. Unless it was at a joint.

A. No, that would be a dislocation.

Q. You don't fracture a joint. Is that right?

A. You dislocate it.

Q. You dislocate it. All right. I was interested in your testimony about the methods which are used to determine certain things from what you had on hand, what was available to you, and you thought you could pretty well determine the height.

A. That height we can pretty well determine from the length of the bones and tables which are made out, according to the length of these bones, unless it is a marked deformity in growth.

Q. Well, that would usually show up, wouldn't it?

A. Yes.

Q. From the bones themselves.

A. As I stated, these are all approximation.

Q. Well, of course, there could be some variance there, but you think that is an approximation, but it could vary some two, three or four, or something like that, I suppose.

[fol. 405] A. Uh huh.

Q. I believe your answer was yes. The reporter can't see you nod your head.

A. My answer was yes.

Q. And the weight, of course that could vary a good bit.

A. Well, the weight is a very marked approximation. I mean, it would be quite difficult to tell from this.

Q. Those bones could have held the frame of more—that weighed more than——

A. Yes.

Q. —one hundred and forty or hundred and fifty pounds, so far as that goes.

A. If she was an obese individual.

Q. Yes.

A. However, we felt, because of the thin skin over the skull, that she probably did not have too much fat on her body.

Q. Now the age, I believe you said that, in your opinion, was somewhere between 25 and 30 years?

A. I said around 25 to 35; 28 to 35 I believe we stated here.

Q. Now is that pretty reliable?

A. I would say reliable. If we wanted to be a little more complete, we could take X-rays of the bones and [fol. 406] look at the ends of the long bones; however, the sutures in her skull were not completely ossified, that is, hardened, which would put her in the under-age class, and, if we did want to pursue it more, we could give you a more correct answer on the age.

Q. But you certainly think that the range you gave there is very accurate.

A. Yes.

Q. Now I believe you testified a few moments ago that you estimated that this skeleton had been buried for some six months.

A. Uh huh, yes.

Q. Incidentally, who first called you on this?

A. It was by request of Mr. Kirksey and Midland County's sheriff's office.

Q. And you did the examination on the same day that the bones were brought to you?

A. Yes.

Q. And did you talk to Mr. Fletcher, the chief deputy in the sheriff's office?

A. We talked to a number of people, but I don't remember exactly who we talked to.

Q. Did you make any report to Mr. Fletcher or Mr. Kirksey after you completed your examination?

A. We sent copies of this report, I believe, to the [fol. 407] sheriff's office and also to the police and, I believe, the district attorney later on.

Q. All right, and that report was dated when?

A. Pardon?

Q. When was that report dated?

A. The dictation was done on the day of the autopsy, which was July 5, 1962. It was probably written up several days later and sent out.

Q. Well, now in the preliminary report that you made, did you not estimate that this body had been interred from six weeks to three months?

A. Yes. We had been given to understand that the

body was found in a sunny place. We felt that the length of death should have been about three months since the grave was quite shallow and it was lying in the sun; however, later on I was told that the grave was shaded from the afternoon sun, and I was brought out to the site of the grave in the afternoon and found that the sand was very cool and also that it was quite moist about a foot down, half a foot down.

Q. Were you brought out there then or sometime later?

A. Later.

Q. How long?

A. I think about six months later.

Q. So the fact, of course, of the ground being moist, [fol. 408] that could be influenced by many things, the amount of rainfall, recent——

A. It was pretty dry but I don't know how long since the rain had fallen, but I know the sand and the surroundings were quite dry.

Q. Of course, in this area in the summertime, why, it usually is pretty hot and dry, isn't it, and you say you did go to that particular place? What time of day did you go out there?

A. It was about noon or afternoon.

Q. Who did you go with?

A. I went with Mr. Smith.

Q. The gentleman here?

A. Yes.

Q. And so after that then you did, without further study, revised your estimate——

A. Yes.

Q. —from six weeks to three months to a six months' period.

A. Yes.

Q. Well, could it have been six weeks to three months, still?

A. I believe it should have been a longer period. It is a little bit difficult to tell exactly the length of time [fol. 409] after death; however, if the body is in the open, exposed to elements in hot weather, it can be ravaged pretty badly in a few weeks. If it is covered somewhat and protected so much from the elements, it can be up to three months, and, if there is some more protec-

tion and in a lower temperature, it can be up to more months than the three months.

Q. A lower temperature.

A. Yes.

Q. Of course, a higher temperature rather accelerates the——

A. Yes.

Q. —decomposition, doesn't it?

A. Uh huh, that's right.

Q. So, during the spring and summer, why, certainly a body would decompose more rapidly than it would in the winter.

A. Yes.

Mr. Legg: I believe that is all.

Redirect examination.

By Mr. Smith:

Q. Did you appear before the grand jury, Dr. Madsen?

A. Yes, in September of 1962.

Mr. Smith: We pass the witness.

Mr. Legg: We have no further questions.

(Witness excused)

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[fol. 410] S. L. VANN, called by the State as a witness in the trial of the case upon its merits, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.

A. S. L. Vann.

Q. Are you married, sir?

A. Yes, sir.

Q. Have children?

A. Yes, sir, one.

Q. Where do you live?

A. 300 East Pine, Midland, Texas.

Q. What is your current employment, please?

A. With Heldie's Portable Pipe, in Odessa.

Q. What was your employment in July of 1962?

A. Midland Police Department.

Q. And how long were you with the Midland Police Department?

A. About three and a half years.

Q. Do you know Marvin Clewis seated over there? [fol. 411] Have you seen him or know him?

A. Yes, sir, I have seen him before.

Q. I call your attention, sir, to January of 1962 and ask you if you had an experience concerning Marvin Clewis.

A. Yes, sir, I did. I received a call while I was on patrol and proceeded to go to these apartments. I am not sure of the correct address of them at this time, but they are right across from Highway 80 facing Highway 80 there. I believe it is on South Street or something there. It is right there facing Highway 80. And I talked to a lady by the name of Mrs. Judie. She told me at this time that her mother was missing and there was a bunch of children that needed to be looked after. I talked to her for a length of time there, her and her husband, and——

Q. By "her husband," whom do you mean? Excuse me, go ahead. I am sorry.

A. I was talking about Mrs. Judie's husband there and their children, and I talked to her for a length of time and then I talked to the gentleman, Mr. Clewis, there. I spoke to him.

Q. All right. Do you have any idea what date this was?

A. No. I recall it was back in January all right. I believe it was somewhere along about the 28th or so. I don't recall exactly.

[fol. 412] Q. Who was doing the reporting? Was it Mr. Clewis, the defendant, doing it, or was it Mrs. Judie or Mrs. Judie's husband? Who was doing the reporting?

A. It was Mrs. Judie.

Q. Was there anything said between Mrs. Judie and Mrs. Clewis in your presence at this time?

A. Very little. There might have been some discussion, but it was very little.

Q. Very little?

A. I don't recall exactly if they did have a discussion or anything. I do remember the discussing of the missing mother. They seemed at one time they couldn't make up their minds just exactly what had happened to her.

Mr. Smith: That is all. Thank you.

Cross-examination.

By Mr. Legg:

Q. Your records, of course, at the police department would show when you made that call, wouldn't they, Mr. Vann?

A. Yes, sir, they would.

Q. Have you checked to ascertain when that was?

A. No, sir, I haven't ascertained exact dates of it, no, sir.

Q. And Mrs. Judie told you that there was a woman missing and a bunch of children needed to be looked after?

[fol. 413] A. There were some small children. She didn't state—I don't recall if she exactly stated a bunch, but she said there was some small children that needed to be looked after. I believe that was the exact way. It has been a good while. I can't recall exactly how she said it.

Q. And did you make a report then to the police department?

A. Yes, sir, I made a missing persons report at that time.

Q. All right, and that could have been, so far as you know, sometime the early part of February, couldn't it?

A. I checked my file. It has been about two weeks ago when I typed it out, and I typed this form out that I turned in to the police department, and I did go over that form about two weeks ago and I do recall it being in January, yes, sir.

Q. It was in January.

A. Yes, sir.

Q. But you don't know when.

A. I don't recall the exact date, no, I don't.

Q. The last few days in January?

A. I couldn't say that truthfully. I don't remember exactly.

Q. Were any accusations made in your presence by any [fols. 414-416] person?

A. No, sir, there were no accusations made in my presence.

Q. Did she want you to report this woman as a missing person or for some criminal violation in connection with this bunch of children you mentioned?

A. She asked me to get in touch with, I believe it was to see about the children. She wanted to see about them and also she wanted to file a Missing Persons Report and see if we couldn't contact her mother.

Q. Did she say anything to you about getting out any kind of warrant for her or anything like that?

A. No, sir, I don't recall that she did say anything about getting out a warrant or anything that way, no, sir.

Q. But she was discussing it with you on the basis principally of child desertion or something of that nature. That right?

A. Principally that, yes, sir.

Mr. Legg: I believe that is all.

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[fol. 417] Linda Ann Clewis, called by the Defense as a witness upon the trial of the case on its merits, after first being duly sworn, testified as follows:

Examination.

By the Court:

Q. How old are you?

A. Thirteen.

[fol. 418] Q. And what is your name?

A. Linda Ann Clewis.

Q. Linda, what grade are you in?

A. Seventh.

Q. Seventh grade?
A. Yes.
Q. When you raise your right hand to take an oath, do you know what that means, Linda?
A. Yes.
Q. That you will tell the truth?
A. Yes.
Q. That you will tell the truth here as you know it.
A. Yes.
Q. And do you know what the difference is in telling the truth and not telling the truth is?
A. Yes.

The Court: All right.

Direct Examination.

By Mr. Legg:

Q. All right, Linda Ann, you are here and you have taken your oath, and what you say on this witness stand is going to be the truth, isn't it?
A. Yes.
Q. All right. Now I believe you said you are thirteen [fol. 419] years old.
A. Yes.
Q. And that you are in the seventh grade in school.
A. Yes.
Q. Now, Linda Ann, is your daddy in the courtroom?
A. Yes.
Q. And where is he?
A. He is sitting right next to you.
Q. Right over here.
A. Yes.
Q. That's Marvin Clewis, isn't it?
A. Yes.
Q. All right. Now, Linda Ann, back about two years ago, in 1962, let's see, you would have been in what grade then?
A. Fifth.
Q. Fifth grade. You would have finished the fifth grade. Is that right?
A. Yes.

Q. And where did you live then?
A. 1400 East Davis, Apartment 7.
Q. All right, and who did you live with?
A. My father and my stepmother.
Q. Now that's Marvin Clewis, and who was your stepmother?
A. Dorothy Mae Clewis.
[fol. 420] Q. And how long had you lived there?
A. In those apartments?
Q. How long had you lived with your father and stepmother wherever you had lived?
A. I don't know exactly how many years, but I lived with them for quite awhile.
Q. All right, and for more than one year?
A. Yes.
Q. More than two years?
A. Yes.
Q. So you had been living with them.
A. Yes.
Q. Now your mother lives in Midland, too, doesn't she?
A. Yes.
Q. But you lived with your daddy.
A. Yes.
Q. Now let me ask you this, Linda Ann. Do you remember when you last saw your stepmother?
A. Yes.
Q. Would you tell us about that?
A. Yes.
Q. All right, go ahead.
A. She had cooked dinner and after she finished we started eating.
[fol. 421] Q. Now do you remember what day it was?
A. No, not exactly.
Q. Do you remember about when it was?
A. No.
Q. Well, now let me ask you this before you go ahead. The time you are telling us about, that is the last time you ever saw her. Is that right?
A. Yes.
Q. And you say you had eaten dinner.
A. Yes.
Q. All right, what did you do after dinner?

A. I swept the floor, and she was getting ready to go out.

Q. Where was she going? Do you know?

A. No.

Q. Now was your daddy there then?

A. No.

Q. Do you know about what time of day that was?

A. Not exactly. It was probably about 6:30.

Q. And your daddy wasn't there.

A. No, he wasn't.

Q. Do you know where he was?

A. Yes.

Q. Where was he?

A. He was working.

[fol. 422] Q. All right, and he didn't usually come in from work until later than that?

A. Yes.

Q. Now, go ahead, excuse me, and tell me about this.

A. I was sweeping the floor and she was getting ready to go out, and when she finished putting on her clothes she went out and got in a taxicab, and that was the last time I saw her.

Q. You saw her get in a taxicab?

A. Yes.

Q. Do you know who was driving the taxicab?

A. No.

Q. Was anybody else in the taxicab that you saw?

A. No.

Q. All right. Now then, Linda Ann, did you stay there then the rest of that night?

A. Yes.

Q. When did your daddy come in?

A. About an hour later.

Q. About an hour later?

A. Yes.

Q. All right, and what did your daddy do then?

A. He fixed his plate and started to eat.

Q. Ate his supper?

[fol. 423] A. Yes.

Q. All right, then did he stay there that night?

A. Yes.

Q. And did you stay there that night?

A. Yes.

Q. All right, and you never have seen your stepmother again.

A. No.

Q. Since that day.

A. No.

Q. Did you keep on living at that place after that day?

A. Yes.

Q. How long did you live there? Do you know?

A. After she disappeared?

Q. Beg your pardon?

A. After she disappeared?

Q. Yes.

A. About two or three weeks.

Q. About two or three weeks, and who did you live there with?

A. My father.

Q. All right, that's Marvin Clewis.

A. Yes.

Q. Now let me ask you this, Linda Ann. You say you [fol. 424] were living there with them.

A. Yes.

Q. And had been for a year or two or more before she disappeared, as you call it. Did your father and your stepmother seem to get along pretty good or not?

A. Yes.

Q. They did?

A. Yes.

Q. All right, did you ever hear them—did you ever hear your father threaten your mother in any way, your stepmother in any way?

A. No.

Q. Did you ever see him hit her or anything like that?

A. No, I didn't.

Q. Sometimes would your stepmother leave and be gone for a period of time, a few days?

A. Yes.

Q. Did she do that pretty often?

A. Yes.

Q. Do you know, Linda Ann, whether or not your stepmother went with other men?

A. Yes.

Q. She did.
A. Yes.
[fol. 425] Q. Did your daddy work most every day?
A. Yes.
Q. And where were you going to school at that time?
A. Booker T. Washington.
Q. Do you make pretty good grades in school?
A. Yes.
Q. What kind of grades do you make?
A. A's, B's and C's.
Q. And have you ever flunked a grade or anything?
A. No.
Q. You have always passed your work?
A. Yes.
Q. Now, Linda Ann, has everything that you have told up here on this witness stand been the truth?
A. Yes.

Mr. Legg: I believe that is all. Pass the witness.
Mr. Smith: Linda Ann, we don't have any questions to ask you. Thank you very much. You may step down.

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[fol. 426] LINDA JONES, a witness called by the Defense, after first being duly sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Legg:

Q. Would you state your name to the jury?
A. Linda Jones.
Q. And how old are you, Mr. Jones?
A. Fifty-nine.
Q. And where do you live, sir?
A. Well, I was raised in Corsicana and Dallas and my later home was Jacksonville.
Q. Well, where did you live back in 1962?
A. Right here in Midland.

Q. At what address?

A. Well, I was staying right where I'm staying now. Then I left and went back to Vernon and stayed about three months, I guess, and I came back and staying right there again.

Q. And what is that address?

A. 304 North Carver.

Q. All right. Now, how long have you lived in Midland?

A. Ever since '52, except for a short while I went back.

Q. Went to Vernon?

[fol. 427] A. Went back to Vernon and stayed about three months in '52, and I come back in '53.

Q. All right.

A. And been here ever since.

Q. Now back in January of 1962, were you living in Midland at that time?

A. In 1962? Yes.

Q. And you were living at 304 North Carver?

A. Yes, that's right.

Q. Did you know Marvin Clewis at that time?

A. Yes, sir.

Q. And did you know his wife, Dorothy Mae Clewis?

A. Yes, sir.

Q. At that time. Now, how well did you know them?

A. Well, they both always treated me nice. I didn't have anything again' either one of them. They both were very nice towards me.

Q. I understand that. Were you around them very much?

A. Yes, quite a bit, quite a bit.

Q. Did they come to the place where you worked to visit?

A. Yes, sir. They come there lots.

Q. And the person that you live with, I believe, is Miss Carrie, isn't she?

A. That's right.

[fol. 428] Q. Now did they ever come there, both of them or one of them, to use the telephone or anything?

A. Sometimes they would come together and sometimes one would come, you know. A lot of times she would come there and leave word for me to tell him to call her,

you know, when he was in town. You see, he worked out of town lots.

Q. I see. Now then, did you have occasion to talk to Dorothy Mae Clewis on the telephone many times?

A. Oh, yeah, she would call there lots on the telephone. She would either ask for Marvin or Aunt Carrie, and I most generally stayed there all the time. I would be there all the time.

Q. Did you talk to her on the telephone to the extent where you could recognize her voice?

A. Well, yes, sir, it seemed like the same voice the last two times she called.

Q. Well, when were those last two time she called?

A. Well, it was about four or five weeks, maybe six, after she was missing. She called there one night about ten.

Q. Did she talk to you?

A. She wanted to talk to him or Aunt Carrie, and I told her either one of them wasn't there.

Mr. Smith: I am sorry, but I can't hear the witness. [fol. 429] Mr. Legg: Will you wait just a minute (addressing the witness). This attorney can't hear you.

Mr. Smith: I didn't understand what he said about the telephone call.

Mr. Legg: Let the Reporter read what he said.

(The Reporter read the last two questions and answers above.)

A. (The Witness) That's right, one night, sir.

Q. About ten o'clock one night.

A. Yes, sir.

Q. Did you talk to her?

A. Yes, sir.

Q. And what did she say?

A. She asked for him and I told her he wasn't there, and she asked for Aunt Carrie and I said, "Neither one of them are here."

Q. Did you have any more conversation with her?

A. No.

Q. Did she tell you where she was?

A. No, sir, she didn't.

Q. Did you ask her where she was?
A. Well, the last time I did, but she didn't tell me.
Q. All right, now when was the last time?
A. Oh, it was about four or five days later one evening [fol. 430] between five and six o'clock she called there.
Q. And you talked to her?
A. Yes, sir.
Q. And you say you asked her where she was?
A. Yes, sir.
Q. Did she tell you who she was?
A. She told me that was her and she talked exactly like her.
Q. All right, is it the same voice that you had heard on the telephone——
A. Same voice I had been hearing ever since she had been calling there, same voice.
Q. All right.
A. Or sounded like it.
Q. And you knew her well.
A. Oh, yes, sir. I knowed her, oh, it was sometime in '53, I think, when I got acquainted with her, or maybe it was about the last of '53 or maybe the first of '54 when I got acquainted with her.
Q. All right, and had you known Marvin about the same length of time?
A. Well, I knew him when I first came here to Midland. In '52 I met him.
Q. I see. Well, I want you to tell this jury whether [fol. 431] or not you are in your own mind certain that you have talked to Dorothy Mae Clewis since she was missing.
A. Well, now, it was just like her voice.
Q. Do you believe——
A. I would say it was her.
Q. Do you believe it was her?
A. Yes, I do, 'cause it sounded just like her.

Mr. Legg: That is all. Thank you.

Cross-examination.

By Mr. Smith:

Q. Mr. Jones, when was it that Dorothy Mae Clewis disappeared?

A. I don't know exact, but now when those phone calls come she had been missing four or six weeks.

Q. You don't know when she disappeared, though. You don't have any idea about that?

A. No, sir, I didn't keep the exact time, you see, because I wasn't thinking nothing about it.

Mr. Smith: We have no further questions. Thank you.

Mr. Legg: Thank you very much, Mr. Jones. You may step down. We call the defendant.

[fol. 432] Marvin Clewis, the Defendant, having previously been duly sworn, takes the witness chair to testify in the trial upon its merits, as follows:

Direct examination.

By Mr. Legg:

Q. State your full name to the jury.

A. Marvin Peterson Clewis.

Q. How old are you, Marvin?

A. Thirty-seven.

Q. Where do you live, Marvin?

A. You mean where do I live now?

Q. Yes.

A. I live at 1602 East Texas.

Q. And where did you live in the month of January of 1962?

A. 1400 East Davis, Apartment 7.

Q. And who did you live with at that time?

A. My wife, Dorothy, and my daughter, Linda Ann.

Q. Now, that Linda Ann is your daughter, is she not?

A. Yes, sir.

Q. She is not Dorothy's daughter?

A. No, sir.

Q. She is your daughter by a previous marriage.
[fol. 433] A. That's right.
Q. Now how long, Marvin, did you and Dorothy live together?
A. Right at seven years.
Q. All right, and since January of 1962, have you ever seen Dorothy Mae Clewis?
A. No, sir, I sure haven't.
Q. How old was Dorothy Mae Clewis in 1962, Marvin?
A. She was forty, forty years old.
Q. And did you and Dorothy Mae have any children?
A. No, sir.
Q. Of your own?
A. No, sir.
Q. All right. Where did you come from to Midland?
A. I came from Rotan, Texas.
Q. How long had you lived in Rotan?
A. I lived in Rotan from '46 up until '52.
Q. '46 to '52?
A. Yes, sir.
Q. And prior to that time where did you live?
A. In Palestine, Texas.
Q. All right, were you in the service?
A. Yes, sir.
Q. How long?
A. Right at three years.
[fol. 434] Q. How long?
A. Right at three years.
Q. What branch of the service were you in?
A. United States Navy.
Q. All right. Now, Marvin, did you and Dorothy Mae—well, let me just ask you this question. Did you ever whip Dorothy Mae?
A. Well, no, sir, I never whipped her.
Q. All right, did you all ever do any—every have any fights?
A. Well, no, sir, I wouldn't say we had no fights, now, but we had arguments.
Q. All right, did—I think you heard Shirley Jean Judie testify in here to the effect that one night you had told her that Dorothy was your wife and you would whip her if you wanted to, didn't you?

A. Yes, sir, I heard her.

Q. Did that happen, Marvin?

A. No, sir.

Q. Did you hit Dorothy or did you beat her in any way on the occasion and certainly on the occasion Shirley Jean was testifying to here?

A. No. sir.

Q. Did you ever beat her?

[fol. 435] A. No, sir.

Q. Now, Marvin, you have already heard Shirley Jean testify up here that one day a policeman came out to her apartment.

A. Yes, sir.

Q. And you heard the policeman testify, too, haven't you?

A. Yes, sir.

Q. Did that happen?

A. Yes, sir, it did.

Q. And about how long was it after the last time you saw Dorothy Mae?

A. I don't know exactly, but I think it was around somewhere in February. It might have been the last of January, but I'm not sure about that.

Q. All right, and did you have a conversation with them then about your wife?

A. Yes, sir.

Q. What was the main import of that conversation, the meaning of that conversation?

A. Well, what Shirley Jean wanted me to do, she wanted me to file charges on her for child desertion.

Q. She wanted you to file charges against her for child desertion.

[fol. 436] A. Yes, sir.

Q. Why was that?

A. Well, she said she just wanted her back home, and she didn't care how she got her back.

Q. All right, she figured she wouldn't come back unless she had to?

A. Yes, sir.

Q. All right. Now she had been gone on several other occasions, hadn't she, Marvin?

A. Yes, sir.

Q. Did she always come back?

A. Yes, sir.

Q. At that time did you or did you not think that she would come back?

A. I figured she would come back. She always did.

Q. All right, now did you go down, ever go to the police station and talk to them about your wife?

A. Well, I went down there one evening. I stopped by there one night after I got off from work and reported her missing. I talked to an officer out there in the hall, and he said they already had a report on it so I didn't try to file no Missing Persons or nothing like that.

Q. All right, did he tell you they would let you know if anything happened or they found her?

[fol. 437] A. Yes, sir.

Q. Now, Marvin, did you during the months of January and February and March when you were living down there—Shirley Jean testified that you from time to time, or a few times at least, had gone to Odessa looking for Dorothy Mae. Is that true?

A. Yes, sir.

Q. Why did you go to Odessa looking for her?

A. Well, I had heard she was living in Odessa with Jimmy Davis.

Q. All right, and did you go to Odessa and look for her?

A. Yes, sir.

Q. Did you stay over there looking for her at night?

A. Well, that's the only times I had to look for her, at night, because I worked in the daytime.

Q. Now you worked for who?

A. Vaughn & Taylor Construction Company.

Q. And how long have you been working for Vaughn & Taylor?

A. About nine years, going on ten.

Q. All right, and what do you do for Vaughn & Taylor at this time?

A. I am dope foreman on a pipe line crew.

Q. Now is that pipe line construction?

[fol. 438] A. Yes, sir.

Q. Now when you say "dope foreman," you're not talking about marijuana or that kind of dope, are you?

A. No, sir.

Q. What kind of dope is it?

A. Well, it's about the same thing as roofing, you know, that is put on the top of a house, what they call roofing or blacking, something like that.

Q. Is it——

A. In other words, it's tar.

Q. All right. It goes over the joints of the pipe?

A. Yes, sir.

Q. And that is what you do mostly?

A. Yes, sir.

Q. Now, Marvin, do you work most every day?

A. Yes, sir.

Q. Do you work five days a week, or six or what?

A. Oh, we work from five to seven days a week, sometimes. That just depends on the job.

Q. All right. Now, Marvin, according to the testimony of Shirley Jean, she said that some shoes had fallen out from under the seat of the truck. Do you recall that testimony?

A. Yes, sir.

[fol. 439] Q. Did you have some shoes in the car that belonged to Dorothy Mae?

A. Yes, sir.

Q. And how long had they been there?

A. Well, I can't say exactly, but they had been there, I know, for seven or eight months, because I was working up there in Joplin, Missouri, and I came home one weekend from up there and she used the truck and drove the truck, and she wore those shoes and carried her Sunday shoes with her so when she got where she was going she could put her Sunday shoes on. She left them in there.

Q. All right, and they stayed in there for a long period of time?

A. Yes, sir.

Q. When were you working in Joplin, Missouri, do you remember?

A. Well, it was in '61.

Q. And that was for Vaughn & Taylor?

A. Yes, sir.

Q. Now, Marvin, I want to talk to you for a few minutes about some of the other evidence in this case. When did

you first hear that a body had been found out here northwest of town?

A. It was on Friday after the 4th of July.

[fol. 440] Q. Friday after the 4th of July.

A. Yes, sir.

Q. All right, how did you find out about that?

A. Elizabeth Johnson called me and told me about it.

Q. Where were you at the time?

A. I was at Borger.

Q. Borger, Texas?

A. Yes, sir.

Q. And were you at that time working for Vaughn & Taylor?

A. Yes, sir.

Q. Building a pipe line?

A. Yes, sir.

Q. All right. Now, did she say anything to you with reference to that?

A. Well, now, she said that there was talking, and they thought it might have been Dorothy's body.

Q. Thought it might been Dorothy's body?

A. Yes, sir.

Q. All right, did she say anything about anybody wanting to see you at that time?

A. Well, not as I—no, if they did I don't remember that, and I don't think she did.

Q. All right. Now, you were in Borger, and then did you work the next day, Saturday?

[fol. 441] A. Yes, sir.

Q. All right, did you work all day?

A. Yes, sir.

Q. And what time did you get off work?

A. Well, we's were getting off at 5:30 then and it usually takes, I'd say, thirty, anywhere from thirty to forty-five minutes to get back to town from where we were working at, and I'd say I got back there about six or six fifteen.

Q. Did you talk to anybody that night?

A. Yes, sir.

Q. Who did you talk to?

A. My sister, Annie May Owens.

Q. Annie May Owens?

A. Yes, sir.

Q. Does she live in Midland?

A. Yes, sir.

Q. Did she call you on the telephone or did you call her?

A. She called me.

Q. What did she say to you?

A. She told me that they had found a body and they thought it was Dorothy and that the sheriff's department wanted to talk to me.

Q. The sheriff's department wanted to talk to you?

A. Yes, sir.

[fol. 442] Q. And then what did you say?

A. Well, I told her I would be right on down as quick as I could get some clothes in the car and I would come on down.

Q. Did you have your car up there?

A. Yes, sir.

Q. And did you drive your car then to Midland?

A. Yes, sir.

Q. How far is it from Borger to Midland, Marvin, if you know?

A. Well, I don't know exactly, but I have had two or three different cars and some of them register 301 miles and some of them registered 199 miles, so it is around the neighborhood of 299 or 300 miles.

Q. All right, you say one of them registered about 301 and the other one about 199?

A. No, 299.

Q. Oh, 299. All right. Now, you drove on down here then. Is that right?

A. Yes, sir.

Q. And do you know about what time you got to Midland?

A. No, sir, not exactly, but it was around 11:30 or 12:00 o'clock.

Q. What did you do when you got here?

A. Well, I came in to the courthouse.

[fol. 443] Q. And who did you talk to?

A. Well, I talked to a deputy sheriff there. He was on duty there.

Q. Did you talk to anybody else?

A. Yes, sir.

Q. Who did you talk to?

A. Well, this deputy sheriff who was on duty called some officer, and this officer came down.

Q. Has that officer testified here?

A. Yes, sir, he, I believe, was the first officer that testified. I believe, now, I don't——

Q. Was it officer Kirksey?

A. Yes, sir.

Q. Kirksey?

A. Uh huh.

Q. Did he talk to you then?

A. Yes, sir.

Q. And how long did he talk to you?

A. Well, he talked to me from the time he got there until about two o'clock.

Q. In the morning?

A. Yes, sir.

Q. Did he put you in jail?

A. No, sir.

[fol. 444] Q. What did he tell you?

A. Well, he told me to go home and be back up there Sunday morning around 8:30 or 9:00 o'clock.

Q. All right, and then did you then do that?

A. No, sir.

Q. No, did you then go home?

A. Yes, sir, I went home.

Q. And did you go to bed?

A. Yes, sir.

Q. All right, did you come back up here the next morning at the time he told you, whatever time it was?

A. No, sir.

Q. Why didn't you?

A. Well, about 6:30 there was an officer that came there.

Q. And who was that officer? Do you know?

A. Well, his name was Sgt. Morales, Jesse Morales.

Q. Sgt. Morales?

A. Yes, sir.

Q. And did he tell you who he worked for?

A. No, sir.

Q. All right, what did he say to you?

A. Well, he asked me was I Clewis and I told him yes, sir, so he told me to come on and go with him, that he wanted to talk to me.

[fol. 445] Q. All right, were you waked up when he got there?

A. No, sir, I was asleep.

Q. I know, but when he got there were you waked up? Did they wake you up then?

A. Yes, sir. Elizabeth woke me up.

Q. Oh. And you came on then with him. In the car?

A. Yes, sir.

Q. His car or your car?

A. His car.

Q. And where did you go?

A. We went out to the police station.

Q. Did you tell him, Marvin, that you were supposed to go back up to the sheriff's office?

A. Yes, sir, I told him that.

Q. What did he say?

A. Well, he said that—he told me to come on and go with him.

Q. All right, and then where did he take you?

A. Down there to the police station.

Q. And was that the police station here in Midland?

A. Yes, sir.

Q. What happened when you got there, Marvin?

A. Well, when I got there we stopped downstairs, and he told me to take everything out of my pockets.

[fol. 446] Q. Did you?

A. Yes, sir.

Q. All right, and then what happened?

A. Well, we went upstairs then.

Q. Now that's at the police station. Is that the one that is down here on East Texas or Illinois down here?

A. Yes, sir.

Q. Where the fire station is in connection with it?

A. Yes, sir.

Q. All right, and is that the place where you had gone when you stopped by there from work one night to tell them about your wife being missing?

A. Yes, sir.

Q. Now you say that was up on the second floor?

A. Yes, sir.

Q. Where did he take you then on the second floor?

A. He carried me back in an office back there.

Q. And what happened then?

A. Well, he started asking me some questions.

Q. What kind of questions?

A. Well, he asked me did I know that they had found the body of my wife, my wife's body.

Q. All right, and what else?

A. And he wanted to know if I killed her.

[fol. 447] Q. Now did he talk to you just a few minutes or did he talk to you over a—well, how long did he talk to you?

A. I don't know exactly, but he talked to me an hour, maybe an hour and a half, or maybe two hours, I don't know, but he talked to me quite awhile.

Q. Did he let you go then?

A. No, sir.

Q. What happened then?

A. Well, there was a—he went out and another officer came in there.

Q. Who was that? Do you know?

A. No, sir, not by name, but it was the same officer who testified, I think, today. It might have been last night. That blond-headed fellow.

Q. A blond-headed fellow?

A. Yes, sir.

Q. All right, and you say he came in there then and talked to you.

A. Yes, sir.

Q. Now that man you are talking about did not testify in the presence of the jury, did he?

A. No, sir.

Q. But you don't know his name?

A. No, sir.

[fol. 448] Q. All right, where were you when he talked to you?

A. I was in the same office down at the police station.

Q. And how long did this blond-headed man talk to you?

A. Well, just guessing, I would say he talked to me

anywhere from an hour, maybe an hour and a half or maybe more. I don't know exactly.

Q. Did you have a watch with you, Marvin?

A. No, sir.

Q. And was there a clock down there or anything that you could check the time during the time any of these people were talking to you?

A. I don't know, sir. I didn't notice if there was.

Q. Didn't notice it.

A. No, sir.

Q. Now, what kind of questions did he ask you, Marvin?

A. Well, he asked me about the same thing the Sgt. Morales did, about my wife and did I kill her and things like that.

Q. Well, what did you say to that?

A. Well, I told him no, sir.

Q. Did you deny having anything to do with the death of your wife?

A. Yes, sir.

Q. Did they say anything to you about identifying any-

[fol. 449] thing as that of your wife's?

A. Well, they didn't—if they did, they didn't say nothing along then about it.

Q. Didn't say nothing then about it?

A. No, sir.

Q. Was this Sgt. Morales in there, too, while this other fellow was talking to you? Did they talk to you together, or what?

A. No, sir, Sgt. Morales wasn't in there.

Q. And the other fellow wasn't in there when Sgt. Morales was talking to you.

A. No, sir, that's right.

Q. All right, now what happened when he finished talking to you?

A. Well, when he finished talking to me, why, Sgt. Morales came back and said he would have to lock me up.

Q. Have to lock you up?

A. Yes, sir.

Q. And did he lock you up then?

A. Yes, sir.

Q. Did he do it or did some other police officer open the cell?

A. I think—well, he did it, because he went and got a bunch of keys and when he came back up there he had [fol. 450] some keys, had a big ring of keys.

Q. All right. Now then, did you stay in the cell for the rest of the day?

A. No, sir.

Q. Well, what happened?

A. Well, he came back and got me.

Q. When did he come back and get you?

A. I don't know. It was in the day sometime. I don't know what time of day it was. I would say it was probably in the afternoon or maybe a little before.

Q. All right. Of course, all this time you didn't have any way of measuring time. Is that right?

A. No, sir.

Q. Well, could you estimate to the jury about how long you stayed in the cell before he came back and got you?

A. I would say about two hours, probably, or maybe an hour and a half.

Q. All right, and then what did he do when he came back that time? Did he take you somewhere or talk to you in your cell, or what?

A. No, sir, he carried me back up there to his office.

Q. To the same place?

A. Yes, sir.

Q. All right, and what happened then?

[fol. 451] A. Well, he wanted me to confess that I killed my wife, and he also wanted me to sign some papers.

Q. What kind of papers?

A. Well, he said something about the papers pertained, I mean, something about taking a lie detector test.

Q. Taking some kind of test?

A. Yes, sir.

Q. How long did he talk to you that time, do you know?

A. No, sir, I don't.

Q. If you had to estimate it, though, for the benefit of the jury, what would you say?

A. Well, I would say anywhere about an hour, maybe an hour and a half.

Q. All right, if he says he talked to you three hours, why, you wouldn't dispute that, would you?

A. No, sir, I couldn't. I didn't have a watch.

Q. All right. Now then, Marvin, during the time he talked to you, was there anybody else there at that time?

A. Well, at one time there was.

Q. Who was that?

A. My mother-in-law was there one time he talked to me.

Q. Did she come down there?

A. Well, I don't know, sir, how she got down there, but she was there.

[fol. 452] Q. Did she tell you that the officers cooperated with them and did what they wanted you to?

A. Yes, sir.

Q. Did anybody else come down there that afternoon?

A. Yes, sir.

Q. Who?

A. Elizabeth Johnson and my sis, Annie May Owens.

Q. Did these people visit with you, now, by themselves?

A. No, sir.

Q. Who else was there while they were talking to you?

A. Sgt. Morales was there.

Q. Was he there all the time that you were talking with the people who came down there, your mother-in-law and your sister and Elizabeth?

A. Well, I don't know whether he was there all the time I was talking to my mother-in-law, but I know he was there all the time I was talking to my sister and Elizabeth.

Q. Now, your mother-in-law, is that Dorothy Mae's mother?

A. Yes, sir.

Q. All right. Now, Marvin, when you got to the police station that morning, did you have anything to eat?

A. No, sir.

Q. Did the officer offer you anything to eat, or anything like that?

[fol. 453] A. No, sir.

Q. Did you have anything to eat that day at noon?

A. No, sir.

Q. Did anybody offer you anything to eat that day at noon?

A. No, sir.

Q. Did you tell them you wanted something to eat that day at noon?

A. No, sir, I didn't tell them.

Q. Any time the rest of the day, that afternoon or that evening, or any time, did they give you any food?

A. No, sir.

Q. Did they offer you any food?

A. No, sir.

Q. Did you have any food from any other source?

A. If I did, I didn't get it.

Q. Was there any food in your cell?

A. No, sir.

Q. What was in there?

A. All I seen was a bunk, a little place where you sleep, and a washing place.

Q. All right, was there running water in there?

A. Yes, sir.

Q. All right, you had water.

[fol. 454] A. Yes, sir.

Q. When you would go back to your cell?

A. Yes, sir.

Q. Did you have it at any other time?

A. Well, no, sir, didn't have it at any other time, but I didn't ask for none any other time.

Q. All right. Now, did you have any coffee or anything like that?

A. No, sir.

Q. Marvin, can you drink coffee?

A. Well, I can but it hurts me, and I don't drink it.

Q. You don't drink coffee.

A. No, sir.

Q. Back in 1962, did you drink coffee?

A. Ever once in awhile.

Q. All right, in 1962 did you have any stomach trouble or anything of that nature?

A. Yes, sir.

Q. What kind?

A. Well, the doctor said it was ulcers.

Q. Ulcers?

A. Yes, sir.

Q. How long have you had trouble with ulcers?

A. Well, ever since I came back out of the service and

[fol. 455] I guess before I left. I went to a doctor after I first came out of the service in '46.

Q. All right, and do you still have that trouble?

A. Yes, sir.

Q. All right. Now, with ulcers, Marvin, is it or is it not important that you eat something regularly?

A. Well, yes, sir, it is.

Q. Now getting back, I believe you said, then, that Sgt. Morales questioned you on Sunday afternoon.

A. Yes, sir.

Q. And how long did you say during all of Sunday afternoon that he questioned you?

A. You mean altogether?

Q. Yes.

A. Probably five hours, anyway.

Q. All right, and where was all that done?

A. Back there in his office.

Q. Back there in his office up in the police station?

A. Yes, sir.

Q. Now, did anybody else talk to you or question you that afternoon other than your mother-in-law, and so forth?

A. You mean—?

Q. Any officer.

A. Yes, sir.

[fol. 456] Q. Now when were you taken back to your cell?

A. Well, I was taken back to my cell after I agreed to —after I signed the paper to take that test.

Q. To take the test?

A. Yes, sir.

Q. All right, and how long did you stay in your cell?

A. I didn't stay in there that time as long as I stayed the first time, I know, but I don't know how long it were.

Q. All right, you didn't stay there all night, did you?

A. Oh, no, sir.

Q. What happened after that?

A. Well, Sgt. Morales came and got me and carried me back in his office there.

Q. All right, did he talk to you some more?

A. Yes, sir.

Q. Now, Marvin, what was he trying to get you to do then?

A. Well, he wanted me to sign a confession saying that I killed my wife.

Q. Did you tell him that you didn't do it?

A. Yes, sir, I told him.

Q. Did you tell him more than once that you didn't do it?

A. I told him a lot of times over and over.

[fol. 457] Q. All right. Now how long did he talk to you that time?

A. I don't know; I don't know exactly, but I would say forty-five minutes to an hour.

Q. All right. Now then, when did—did any other officer talk to you that night?

A. Yes, sir.

Q. Do you know who that was?

A. I think it was this big fellow that smoked a pipe, I believe it were.

Q. All right. You don't know his name?

A. No, sir.

Q. And was he one of the officers over there at the police station?

A. Yes, sir.

Q. Didn't he tell you he was?

A. Well, no, sir, he didn't say he was, but I figured he was an officer; he was talking to me.

Q. All right, did he ask you these same questions?

A. Yes, sir.

Q. Ask you other questions?

A. Yes, sir.

Q. Now what time of the day or night was that, would you say?

A. Well, it was night. I don't know what time it was.

[fol. 458] Q. All right, and did he talk—you said, I believe, he talked to you for a good long time, an hour or so?

A. Yes, sir.

Q. Now did any other officer talk to you by himself that night?

A. Yes, sir, I think. Now, I'm not for sure, but I think this was the same fellow who testified in here, a dark-headed fellow.

Q. Well, I just wanted to know what—describe him. Do you know his name?

A. No, sir, I don't know none of them's names down there.

Q. What did he look like?

A. Well, he was a tall guy with dark hair.

Q. All right. Now this is Sunday night.

A. Yes, sir.

Q. And this is after the fellow with the pipe talked to you?

A. Yes, sir.

Q. And after Sgt. Morales had talked to you?

A. Yes, sir.

Q. Was Sgt. Morales still around there or had he gone?

A. Well, I didn't see him, so I guess he were gone.

Q. All right. Now, did they—how long did they—incidentally, did they take you back to your cell any during [fol. 459] that time?

A. No, sir.

Q. Did—well, I'll ask you this. How long did the tall, dark-headed fellow talk to you?

A. Well, I don't know, sir, but he talked to me for quite awhile, over into the night.

Q. Over into the night.

A. Yes, sir.

Q. Now, Marvin, when you say "over into the night," what do you mean?

A. Well, I mean it was—to my notion, I figure it was 12:00 o'clock or after.

Q. All right.

A. Just by me figuring it.

Q. All right. Now were they all saying the same thing to you?

A. Yes, sir.

Q. And what was that?

A. Well, they wanted me to confess that I had killed my wife and tell them how and tell them all about it. That's usually the way they would say it.

Q. Did you deny each and every time that they asked you about it?

A. Yes, sir.

[fol. 460] Q. All right. Now, you say that some time, you think maybe after midnight, that you went back to your cell?

A. Yes, sir.

Q. And did you stay there then the rest of the night?

A. Yes, sir.

Q. With reference to time, Marvin, could you say as to whether it was twelve, one, two,—do you have any idea what time it was?

A. Well, no, sir, but I estimate two or maybe three; I don't know, but I estimate around two or three, anyway.

Q. All right, did you sleep there then the rest of the night?

A. Well, I went in there and laid down, but I didn't sleep none.

Q. Now the next morning then, what happened?

A. The next morning I sees Sgt. Morales. He came back there at my cell, I think, and got me.

Q. Do you know what time that was?

A. No, sir.

Q. Well, was it early or——?

A. Yes, sir, it was early in the morning, real early.

Q. Early in the morning.

A. Yes, sir.

Q. And where did you go then?

[fol. 461] A. Well, I went downstairs to his car, to his car down there.

Q. All right, and was there anybody else there?

A. Yes, sir, there was two.

Q. Who was that?

A. Well, it was two officers.

Q. You don't know who they were?

A. No, sir.

Q. You don't know their names, I mean.

A. No, sir.

Q. All right, and did you go somewhere then in the car?

A. Yes, sir.

Q. Where did you go?

A. Well, we went out to Big Springs Street, out on the other side of the Public Safety Building out there, on the country road out there.

Q. Country road?

A. Yes, sir.

Q. All right, tell us about that. What happened then?

A. Well, Sgt. Morales pulled up in a field there and parked his car and we got out of it. There was a little trail leading up——

Q. A trail leading up?

A. Yes, sir. So he walked up a trail a piece, pretty [fol. 462] good piece, and he stopped and told me——

Q. Where were you now with reference to where Morales was at that time?

A. Well, I was behind him at that time.

Q. All right, and what happened then?

A. Well, he stopped and told me to go ahead.

Q. Did you?

A. Yes, sir.

Q. All right. Now, was anything said to you then out there?

A. Yes, sir. I walked on up there and there was a place with a hole in the ground there and I stopped, and I don't know now who said that, whether it was Sgt. Morales or some of the other officers, but they asked me, "do you know what that is?"

Q. Did you answer?

A. Yes, sir, I answered.

Q. What did you tell them?

A. I told them I guessed that's where he found the body at.

Q. Had they told you now that that was where you were going, or anything like that?

A. No, sir.

Q. Of course, you had talked about it to Elizabeth and [fol. 463] to your sister, hadn't you?

A. Yes, sir.

Q. Had you seen the paper about this being found out here?

A. Well, no, sir, I hadn't seen the paper, but I had talked to Elizabeth and my sister about it, and I think

she told me that she had went up and seen about it, seen the body.

Q. Had they told you where it was that this body was found?

A. Yes, sir.

Q. Now how long did you stay out there?

A. I would say fifteen or twenty minutes, thirty at the most.

Q. Now then, Marvin, if Sgt. Morales says it was about seven o'clock in the morning when you got in the car and went out there, is that about right?

A. Well, yes, sir, I guess it would be, because he had a watch and I didn't.

Q. You didn't have a watch.

A. No, sir.

Q. So you don't know. All right.

A. No, sir.

Q. Now after that, Marvin, where did you go?

[fol. 464] A. If I am not mistaken, we came back to the, ah, whatever place it is on Big Springs Street back here, up here on Big Spring.

Q. What place?

A. It was the place they carried me to have that test. I think they call it the Public Safety Building, or something like that.

Q. Public Safety Building?

A. Yes, sir.

Q. Now, Marvin, did you or could you have come by the police department and change clothes before you went out there?

A. Well, I might of have. I don't remember but I could of have. It seems to me like I changed some clothes once that day somewhere, but I don't know if it was that morning or that evening.

Q. All right. So if Sgt. Morales says he did bring you back to the police station, you don't say that that might not have happened. Is that right?

A. No, sir, I don't.

Q. All right. Now, when you got out there to this other place then, whenever it was, how long did you stay out there?

A. You mean out to this——

[fol. 465] Q.—Public Safety Building.

A. I stayed out there all day.

Q. All day.

A. Yes, sir.

Q. All right. Now, Marvin, let me go back just a little bit and ask you this: now, did you have anything to eat at any time Sunday night?

A. No, sir.

Q. Did anybody offer you anything to eat or drink or anything of that nature?

A. No, sir.

Q. What about Monday morning? Did you have breakfast down there?

A. No, sir.

Q. Did you have rolls or coffee or anything like that?

A. No, sir.

Q. Did anyboody offer you any rolls or coffee or anything?

A. No, sir.

Q. Now then, I believe you said that on Sunday night, when they took you back to your cell, that you went back there and laid down but you didn't sleep much?

A. No, sir, I didn't.

Q. Were you having any trouble with your stomach?

A. Well, yes, sir, my stomach was hurting, and I was [fol. 466] hungry and I was also tired.

Q. All right. Now, of course, you had, I believe, by your testimony, you said that you had worked all day Saturday.

A. Yes, sir, that's right.

Q. And you drove from Borger to Midland Saturday night.

A. Yes, sir.

Q. And you had talked to Mr. Kirksey down here in the sheriff's office until about two o'clock in the morning.

A. Yes, sir.

Mr. Smith: May it please the Court, he is summing up everything, and we object to this repetitious summation.

The Court: Go ahead. Let's move on with this.

Mr. Legg: All right.

Q. And then at 6:00 or 6:30 the next morning, officer Morales took you to the police station. Now is that right?

A. Yes, sir.

Q. All right. Now after that time, Marvin, from 6:00 o'clock or 6:30 Sunday morning, were you either at the police station or at the Public Safety Building until Monday night, with the exception of the time you went out here to the place on Big Spring?

A. Yes, sir, that's right.

Q. Now during the time Sunday that you were questioned, Marvin, were the police trying to get you to sign a statement?

[fol. 467] A. Yes, sir.

Q. And did you deny or, well, did you ever agree to do so?

A. No, sir.

Q. And that includes all of Sunday and Sunday night?

A. Yes, sir.

Q. All right. Now, Monday morning, when you got out to the Public Safety Building—is that the building that is called the Department of Public Safety building out here?

A. Yes, sir.

Q. All right, when you got out there, who did you talk to?

A. Well, it was a Mr. ——

Q. Was it a Mr. Reed?

A. Yes, sir, it was a big fellow.

Q. All right, and where did he take you?

A. Well, he took me back in a little room. I guess it was his office. Anyway, it was a little room back there.

Q. All right, and how long did you stay back there?

A. I would say two to three hours back there.

Q. Was anybody in the room besides you and this Mr. Reed?

A. No, sir.

Q. Did any of the officers who took you out there, were [fol. 468] they in the room with you at the time?

A. At the time I was in the room with Mr. Reed?

Q. Yes.

A. Well, there was when they first carried me in there, but they left out.

Q. All right, and do you know where they went?

A. No, sir.

Q. All right. Now then, you say you were probably in there—how long did you say?

A. I would say maybe from one to two or three hours. I don't know. I was in there——

Q. For a long period of time?

A. Yes, sir, I was in there for a long time, but I don't know how long.

Q. All right, and did he question you about this?

A. Yes, sir.

Q. All right, did you deny to him that you had anything to do with killing your wife?

A. Yes, sir.

Q. And then after that did anybody else talk to you that day?

A. Yes, sir.

Q. Who?

A. Well, there was Ranger Wood talked to me that day.

[fol. 469] Q. All right, did he talk to you once or twice or on how many occasions?

A. Well, he talked to me two or three different times, or maybe four or five, I know.

Q. All right. Now, did any of the other officers talk to you?

A. Well, this Sgt. Morales, he talked to me.

Q. And did he talk to you for long periods of time or just a few minutes, or what?

A. Well, yes, sir, he talked for what seemed to me to be an hour and something, anyway.

Q. All right, did he talk to you more than once that day?

A. Yes, sir.

Q. Now did this Mr. Reed talk to you any more?

A. Yes, sir.

Q. How long did you stay out there? You said you

stayed out there the rest of the day. Do you remember what time you left there?

A. No, sir.

Q. Now while you were there, Marvin, did anybody threaten you or do anything to you while you were out there?

A. Yes, sir.

Q. Well, who made any threats to you?

A. Well, there was Sgt. Woods, Ranger Woods, and [fol. 470] this big fellow I said was operating the machine, and also Sgt. Morales.

Q. All right, and what kind of thr...ts were made to you when you were out there, Marvin?

A. Well, there was one made that they said that they knowed that I killed my wife, and they told me to confess and tell them all about it, and they called me, well, they called me dirty names.

Q. Now who called you dirty names?

A. Well, Sgt. Woods.

Q. What kind of names did Sgt. Woods call you? Marvin, if you want to, you can abbreviate it, whatever you want to do.

A. Well, I don't know that I know how to abbreviate it, but he said that if I didn't confess they would take me back out to the grave and beat my you-know-what, and they also asked me didn't I believe he would do it.

Mr. Smith: I beg your pardon?

Q. He asked you did you believe he would do it?

A. Yes, sir.

Q. All right, were any other threats made to you?

A. Yes, sir.

Q. Who made those?

A. Well, this polygraph operator made threats.

[fol. 471] Q. What did he threaten?

A. Well, he said, "You so-and-so, you know you killed your wife and we know you killed her. Why don't you come on and confess?"

Q. Marvin, did he call you a black son-of-a-bitch?

A. Yes, sir.

Q. And the Ranger called you that name?

A. Yes, sir, he called me that.

Q. During this questioning how long would you say into the day that continued?

A. Well, it continued over into the evening, I know. I don't know what time of day, but I know it was over in the evening.

Q. Now by evening you mean after 12:00 o'clock?

A. Yes, sir.

Q. In the day?

A. Yes, sir.

The Court: Excuse me, Mr. Legg, I believe we will recess now until 7:00 P.M. Gentlemen of the jury, we will have a night session tonight. It will probably be a long one. Try to get all the rest you can during your dinner hour. The Court will stand recessed until 7:00 o'clock P.M.

[fol. 472] (Court then stood at recess until 7:00 o'clock P.M., at which hour the trial proceeded as follows:)

Q. (Mr. Legg) You are the same Marvin Clewis, the defendant, who was testifying just before recess, are you not?

A. Yes, sir.

Q. Marvin, have you ever been convicted of a felony in this state or in any other state?

A. No, sir.

Q. Now, Marvin, I believe we were talking about the questioning that was going on out there at the Public Safety Building on North Big Spring Street at the time we recessed for dinner. Is that what we were talking about before recess?

A. Yes, sir.

Q. All right, was it still daylight or was it dark when you left the Public Safety Building out there that night?

A. It was still day.

Q. Was it late in the evening, early or when?

A. Well, it seemed late in the evening.

Q. Late in the evening.

A. Yes, sir.

Q. All right. Now, Marvin, we were discussing, I think,

some of the threats that you said these officers had made to you while you were out there that day.

[fol. 473] A. Yes, sir.

Q. Now did Sgt. Morales make any threats to you?

A. Yes, sir.

Q. What kind of threats did he make?

A. He said he knowed I killed my wife and I might as well come on and confess and tell them what they wanted to know, and that I wasn't leaving there until I did.

Q. Now Sgt. Morales told you that you couldn't leave there until you confessed? Is that right, Marvin?

A. Yes, sir.

Q. Did anybody else tell you the same thing while you were out there?

A. Yes, sir.

Q. Who was that?

A. Mr. Reed, I think is his name.

Q. Reed?

A. Yes, sir.

Q. Now that is the polygraph operator that you referred to a little while ago. Is that right?

A. Yes, sir.

Q. All right. Now, when were those threats made to you? Were they made to you—you say they were made to you that day at the Department of Public Safety. Was it toward the end of the interrogation out there or about the middle, or when?

[fol. 474] A. Well, it was just about at the end of it.

Q. About the end of it.

A. Yes, sir.

Q. Now, Marvin, when you were out there that day, did anybody hit you or strike you in any way?

A. Yes, sir.

Q. Who?

A. Sgt. Morales.

Q. Did he hit you?

A. Yes, sir.

Q. Where?

A. Up side the face, side the head.

Q. Up side the head?

A. Yes, sir; right up here. (Points toward his head.)

Q. All right, did he seem mad when he did that?

A. Yes, sir.

Q. Now, Marvin, were you—did you curse any of these officers out there any time?

A. No, sir.

Q. Were you respectful to them?

A. Yes, sir.

Q. All right, you weren't asking for any trouble out there. Is that right?

A. No, sir, sure wasn't.

[fol. 475] Q. Now, Marvin, did anybody else hit you while you were out there?

A. Yes, sir.

Q. Who?

A. Mr. Reed.

Q. All right, and do you remember when that was?

A. That was the same evening, just a little before I signed that paper.

Q. Before you signed the statement out there?

A. Yes, sir.

Q. Now, Marvin, you did give the officers, the policemen out there, and Ranger Wood and Mr. Reed, you did give them a written statement then late Monday afternoon. Is that right?

A. Yes, sir.

Q. And in that statement, Marvin, did you tell the truth?

A. Yes, sir.

Q. Was the statement that you gave them out there, Marvin, true? I am not talking about the statement you just gave me in reply to my question,——

A. You mean——

Q. —but was the statement that you gave out there true?

A. You mean the statement that I put on the paper?

Q. The statement you have to them, that you signed out there.

[fol. 476] A. No, sir, it wasn't true.

Q. What did you say in that statement, Marvin? Did you say in that statement that you had participated in the death of your wife? I mean that—

A. Yes, sir.

Q. —you had been involved in the death of your wife. You know what I mean?

A. Yes, sir.

Q. And you said that.

A. Yes, sir.

Q. How did you tell them that she met her death?

A. Well, I didn't know how she had met her death when she died, but the way Sgt. Morales had been talking he talked as if she was shot.

Q. Well, what did you say in the statement as to what happened to her?

A. Well, I said in the statement that we was arguing and she had a gun laying in the seat, and she got the gun to shoot me and I got on my brakes and stopped the truck real fast, and I grabbed her and we started tussling over the gun, and the gun went off.

Q. Was that true, Marvin?

A. No, sir.

Q. Now, Marvin, did you say anything in that statement [fol. 477] about where you had been that night?

A. Yes, sir.

Q. And where did you say in your statement that you had been?

A. I said we had been to the liquor store.

Q. Were those your words, Marvin?

A. Well, I said them but they was—in a way it was kind of—I don't know how you call it. It was kind of suggested to me, but he asked were we drunk and had we been drinking, so I figured he figured we had been out to the Line.

Q. Had he asked you that question as to whether you had been to the Line or not?

A. Well, he—

Q. Or did anybody ask you that question?

A. Well, he had asked me that that Sunday.

Q. Who was that?

A. Sgt. Morales.

Q. Sgt. Morales?

A. Yes, sir.

Q. All right. Marvin, who took that statement from you, which officer?

A. Well, Sgt. Morales took it.

Q. Did he ask you questions and you would answer them, or did you just start talking and he wrote it down?

[fol. 478] A. Well, he asked me questions and I would answer then the best I could.

Q. Now when you say "the best you could," what do you mean? You said the statement wasn't true, didn't you?

A. Yes, sir.

Q. Now what do you mean when you said you answered the best you could?

A. Well, I would answer them the way I figured he wanted me to.

Q. The way you figured he wanted you to.

A. Yes, sir.

Q. Did he let you know how he wanted you to answer the questions?

A. Well, in some things he'd ask me "did it happen that way?", and I figured that's the way he wanted it to happen, so I said, "Yeah."

Q. All right, most of the time then were you just agreeing with Sgt. Morales as to about what happened?

A. Yes, sir.

Q. Now, Marvin, you say that statement out there wasn't true.

A. No, sir, it wasn't true.

Q. Why did you sign it?

A. Well, I was tired and I was hungry and I was sick, [fol. 479] and I asked Mr. Reed for something to eat, some milk, and he said that when I signed the statement he would give me some milk.

Q. When you signed the statement he would get you some milk?

A. Yes, sir.

Q. All right, and did he do that?

A. Yes, sir.

Q. After you signed the statement or before?

A. I signed the statement and he gave me the milk.

Q. Then they gave you the milk.

A. Yes, sir.

Q. All right. Now, Marvin, at that time you say you were sick?

A. Yes, sir.

Q. How were you sick?

A. I was sick at the stomach. My stomach was bothering me. I hadn't eaten nothing since that Saturday.

Q. You hadn't eaten anything since that Saturday?

A. No, sir.

Q. All right. Marvin, I want to ask you one thing: at any time you were out at the Public Safety Building out here on North Big Spring Street, did anybody give you a coke?

A. No, sir.

[fol. 480] Q. Did anybody give you any cigars?

A. No, sir.

Q. Did anybody give you any soup?

A. No, sir.

Q. Did they give you any soup the night before?

A. No, sir.

Q. Did they bring you anything to eat?

A. No, sir.

Q. Did they ever offer you anything to eat Sunday or Monday until after you signed the statement?

A. No, sir.

Q. Now then, Marvin, you say late in the afternoon then you left the Public Safety Building?

A. Yes, sir.

Q. Where did you go?

A. We first came back to the police station.

Q. You did?

A. Yes, sir.

Q. And how long did you stay there?

A. Wasn't but a few minutes. They went in there and got some papers or did something. I don't know what they did; I don't know what they went in there for, but we didn't stay there very long.

Q. All right, and then where did you go?

[fol. 481] A. We came over to the courthouse.

Q. To this building right here?

A. Yes, sir.

Q. Do you know where in the courthouse you went?

A. Well, no, sir, I know we went down in the basement.
Q. All right, who did you see down there?
A. I saw some fellow down there. I didn't know him.
Q. All right, and what happened there?
A. Well, he read off something and said they were charging me with murder with malice or something.

The Court: I think the jury is having quite a bit of trouble hearing him, Mr. Legg.

Q. With murder with malice, did you say?
A. Yes, sir.
Q. And then after that, Marvin, did—well, just tell us what happened.
A. Well, after that, why, he read something else to me, said something else, and said something about setting a bond.
Q. Said something about setting a bond.
A. Yes, sir.
Q. All right, and was that done?
A. Yes, sir.
Q. Marvin, did you have a lawyer with you there?
A. No, sir.
[fol. 482] Q. Had you ever talked to a lawyer?
A. No, sir.
Q. I am talking about since they picked you up or anything like that.
A. No, sir, I hadn't talked to a lawyer.
Q. All right, did you understand all those proceedings down there?
A. No, sir, I didn't understand any of it.
Q. Did they tell you before you went over there what they were going to do?
A. No, sir.
Q. Now is that the first time you had ever been taken before anybody and charged with anything?
A. Yes, sir, outside of shooting dice.
Q. No, I'm not talking about ever in your life. You say one time you were charged with shooting dice?
A. I mean I paid a fine for it.
Q. You paid a fine for it.
A. Yes, sir.
Q. Well, now, the question I am asking you, though, is

that the first time since you had been arrested or taken into custody by officer Morales Sunday morning that you were taken before anybody and charged with anything?

A. Yes, sir.

[fol. 483] Q. Now what time of the day was that on? I mean, was it dark or light or what?

A. Well, I don't remember, but I don't think it was quite dark, though. It looked like it was just about this time now.

Q. All right. Now then, what happened then? Did you go to the sheriff in the county jail?

A. No, sir.

Q. They didn't deliver you to the sheriff's department then?

A. No, sir.

Q. Where did they take you?

A. They took me back over there to the city.

Q. They took you back over to the city jail?

A. Yes, sir.

Q. Now what did they do then? Did they put you in a cell?

A. Yes, sir.

Q. Did they feed you anything?

A. No, sir.

Q. Did they offer to give you anything to eat?

A. No, sir, not that night.

Q. When you were coming in that day, did they stop out here at a grocery store and buy any soup or anything like that?

[fol. 484] A. No, sir. He stopped, Sgt. Morales did, and he got cigars. He gave me a cigar.

Q. He gave you a cigar then.

A. Yes, sir.

Q. Now had they given you any cigars at the police station or out at the Public Safety Building at any time Sunday or Monday?

A. No, sir.

Q. Now you smoke cigarettes, Marvin?

A. Yes, sir.

Q. After they put you in the cell then, did you stay there the rest of the night?

A. No, sir.

Q. What happened?

A. Well, they came and got me and carried me back up there to the office.

Q. And who is "they"?

A. Sgt. Morales was the one that came and got me.

Q. All right, and you say they took you to the office. He took you to the office.

A. Yes, sir.

Q. What happened after that?

A. Well, he started questioning me, and he said he knowed I'd killed my wife but it didn't happen that way. [fol. 485] Q. It didn't happen that way?

A. Yes, sir.

Q. You had already given them a statement out at the Department of Public Safety when he was saying that to you, and it was the same night?

A. Yes, sir.

Q. Now did he talk to you very long?

A. Yes, sir.

Q. What was he trying to get you to do?

A. Well, he were trying to get me to tell the way it happened; he said he knowed it didn't happen that way. He said he knowed that I choked her to death. I still told them that I didn't kill her.

Q. Was he trying to get you to say then that you choked here to death?

A. Yes, sir.

Q. And you told him that you didn't do that.

A. Yes, sir.

Q. You told him that you didn't kill her in any way. Is that right?

A. Yes, sir.

Q. Now, Marvin, how long did he talk to you that night, do you know?

A. No, sir, I don't. I could guess, but that's all I would [fol. 486] be doing.

Q. Well, all right, give us a guess. You said you talked to him a good long time.

A. Yes, sir.

Q. How long would you say?

A. I'd say anywhere between an hour, hour and a half, and maybe two.

Q. Now this was Monday night at the police station. That right?

A. Yes, sir.

Q. All right. Was he the only one who talked to you down there that night?

A. No, sir.

Q. Who else questioned you or talked to you?

A. Another officer talked to me.

Q. Which one?

A. A big fellow with a pipe.

Q. The big fellow with the pipe.

A. Yes, sir.

Q. All right. Now, what did he talk to you about?

A. Well, about the same thing and wanted me to tell how it happened and said just get it off my chest and tell how it happened.

Q. And how long did he talk to you?

[fol. 487] A. I imagine around the same time or maybe a little longer.

Q. Now were they the only ones who talked to you Monday night?

A. No, sir.

Q. Somebody else talk to you?

A. Yes, sir.

Q. Who? Who was that?

A. That was a tall, dark-headed fellow.

Q. You know his name?

A. No, sir.

Q. Was he the one who talked to you the night before?

A. Yes, sir.

Q. All right, and did he talk to you a good while, too?

A. Yes, sir.

Q. Shorter or longer than the other?

A. Well, I don't know. Seemed like longer, because he went back in the other office after something and then came back and started talking to me again.

Q. Now, was he just visiting with you, Marvin, or was he asking you questions or trying to get you to do something, or what?

A. Well, he was asking me questions and trying to get me to make another statement.

[fol. 488] Q. Now was Sgt. Morales there when these last two officers were talking to you?

A. I don't know, sir; I didn't see him.

Q. You didn't see him any more after he got through?

A. No, sir.

Q. They talked to you one at a time. Is that right?

A. Yes, sir.

Q. Did anybody else talk to you that night?

A. No, sir.

Q. What happened then?

A. They carried me back to my cell then.

Q. Now, Marvin, any time that night did you have anything to eat?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Was it pretty late when they carried you back to your cell?

A. Yes, sir.

Q. You have any idea what time it was?

A. Well, no, sir, but I figured it was after midnight, though.

Q. You figured it was after midnight.

A. Yes, sir.

[fol. 489] Q. Did they leave you in the cell the rest of the night?

A. Yes, sir.

Q. All right. Now, of course, Marvin, I know you didn't have a watch at any time, did you?

A. No, sir.

Q. Did you ask every once in a while or any time what time it was, or anything like that?

A. No, sir, not that night.

Q. What I mean, any time up to now do you remember asking what time it was?

A. Well, that Sunday I asked Sgt. Morales once or twice the time.

Q. You did?

A. Yes, sir.

Q. All right. Now did anything happen Tuesday?

A. Yes, sir.

Q. What?

A. Well, Sgt. Morales and I think some other officer, I don't know, but, anyway, he came that Tuesday morning and got me and brought me back to his office that time.

Q. Do you have any idea what time that was?

A. No, sir, but it was early in the morning, I know.

Q. Early in the morning?

A. Yes, sir.

[fol. 490] Q. And what happened then?

A. Well, there was another officer in there, and he asked me some questions.

Q. You know who he was?

A. No, sir.

Q. Had he ever questioned you before?

A. No, sir, not as I knows of.

Q. How long did that go on?

A. Well, he didn't stay there very long. I mean, he didn't ask me questions very long. I don't know whether he stayed there or not.

Q. About how long?

A. Oh, it couldn't have been over five or ten minutes, something like that.

Q. All right. Now after that did they take you back to your cell?

A. Yes, sir.

Q. Did anybody else question you?

A. Yes, sir.

Q. Who?

A. Well, Sgt. Morales questioned me first.

Q. Now this was Tuesday?

A. Yes, sir.

Q. Go ahead.

[fol. 491] A. And then—I'm not sure which other officer —I'm not sure whether it was the fellow that had the knot up the side of his head there or —

Q. Speak louder, please, Marvin.

A. I am not sure whether it was the fellow, the tall, blond fellow that has got the knot up side his eye, or the big fellow. One of them questioned me next.

Q. Now is this Tuesday morning?

A. Yes, sir.

Q. Did anybody else question you that morning?

A. Yes, sir.
Q. Who?
A. This dark-haired fellow, he questioned me.
Q. He did?
A. Yes, sir.
Q. All right, how long did that questioning go on Tuesday? Did they ask you a good many questions?
A. Yes, sir.
Q. And how long did it take?
A. I really don't know.
Q. Marvin, were they all asking you questions for about the same length of time, and then the others would come in and ask you questions about the same length of time?
A. Well, yes, sir, it seemed like one would stay longer [fol. 492] than the other, or maybe I was just thinking he would, I don't know, but they all stayed quite a while.
Q. Most of the time did it seem to be pretty close to about the same time to you?
A. Yes, sir.
Q. Now did they question you any more that day?
A. Yes, sir.
Q. When was that?
A. Well, it was later on that evening and that night.
Q. All right, who questioned you then?
A. Well, it was—I know at the time Sgt. Morales started out questioning me and this dark-headed fellow and then the fellow that smoked a pipe.
Q. Now that went through that afternoon and that evening and did you say that night?
A. Yes, sir.
Q. Did they question you pretty late that night?
A. Well, it seemed to me it was late.
Q. All right, were you pretty tired?
A. Yes, sir.
Q. Marvin, did they feed you Tuesday?
A. Yes, sir.
Q. What did they give you? Did they give you breakfast?
A. I don't know whether you call it breakfast or not. [fol. 493] I mean, they fed me, though.
Q. What did they feed you?
A. Well, it was a potato and a roll and a slice of bologna.
Q. And they gave you that some time that day.

A. Yes, sir.

Q. Do you know about when?

A. No, sir.

Q. All right, did you have any soup that day?

A. No, sir.

Q. And you say you think that questioning went on pretty late that night.

A. Yes, sir.

Q. Now, Marvin, you testified about what happened Monday night and Tuesday and on into Tuesday night. Were any threats made against you at that time by these officers?

A. No, sir, not after I signed that first statement there wasn't.

Q. Did anybody hit you after that? I am talking about now Monday night and Tuesday, Tuesday night.

A. No, sir.

Q. But they did continue to question you during Tuesday and Wednesday?

A. No, sir.

[fol. 494] Q. They let you alone Wednesday?

A. Yes, sir.

Q. Now during all the questioning that you have told this jury about that happened on Monday night and Tuesday and Tuesday night, after you had signed that first statement about the gun,—

A. Yes, sir.

Q. —did you tell them during that period of time that you didn't kill your wife?

A. Yes, sir.

Q. Did you at any time, on Monday night, or Tuesday during this questioning that you are talking about, did you tell them that you killed her?

A. No, sir, I never did.

Q. Did anybody come to see you Tuesday?

A. Yes, sir.

Q. Who?

A. If I don't have the days mixed up now—I may have the days mixed up—seems to me like—no, it was one day. I don't know which day it was and it's just like I say, I might have them mixed up, but my ex-wife came up there one day.

Mr. Smith: Beg your pardon. Who?
The Witness: My ex-wife.

[fol. 495] Q. All right, is that all that came to see you Tuesday?
A. No, sir, Mabel Webster came up there.
Q. Did she come with her?
A. Well, no, sir, they didn't come together. They came separately.
Q. Who is Mabel Webster?
A. That's a friend of ours but stayed down on Pennsylvania.
Q. Friend of yours and Dorothy's?
A. Yes, sir.
Q. All right. Now, was that during the time you were being questioned by these officers?
A. Well, that was during one of the times I was back there locked up.
Q. Back there locked up.
A. Yes, sir.
Q. Now they did take you back to your cell sometime during the day. Is that right?
A. Yes, sir.
Q. When you ate that food that they gave you, where did you eat that? In the cell?
A. Yes, sir.
Q. Now I believe you say they didn't question you at all Wednesday?
[fol. 496] A. There was one day they didn't question me. I think it was Wednesday; I am not sure.
Q. Well, what about Thursday? Was it Thursday?
A. Well, no, sir, it wasn't Thursday.
Q. Well, what happened Thursday?
A. Well, Sgt. Morales came and got me out of my cell early Thursday morning.
Q. Early Thursday morning?
A. Yes, sir.
Q. All right, and did he tell you what for?
A. No, sir.
Q. What happened then?
A. Well, we left and went to Borger.
Q. Went to Borger?

A. Yes, sir.
Q. Borger, Texas.
A. Yes, sir.
Q. All right, how did you go to Borger?
A. Went in Ranger Wood's car.
Q. Who went?
A. Me, Ranger Wood, and Sgt. Morales, and another fellow.
Q. Another fellow?
A. Yes, sir.
Q. Who was he?
[fol. 497] A. Well, he was a chemistry, I think.
Q. A chemist?
A. Yes, sir.
Q. All right. Was he down at the police station that morning?
A. No, sir, I think they picked him up out at the Public Safety Building out there.
Q. All right, was Ranger Wood down at the police station Thursday morning?
A. Yes, sir.
Q. And you and Sgt. Morales then got in his car.
A. Yes, sir.
Q. All right, and then you picked up this other man at the Public Safety Building.
A. Yes, sir.
Q. And then where did you go?
A. Went to Borger.
Q. All right. How long did it take you to get up to Borger?
A. I don't know, sir.
Q. Where were you sitting in the car going to Borger?
A. In the back seat.
Q. Who was sitting back there with you?
A. Sgt. Morales.
[fol. 498] Q. Who was driving?
A. Ranger Wood.
Q. Now what did you do in Borger?
A. Well, he went up there to look in my truck.
Q. What?
A. He went up there to look in my panel truck.
Q. All right, did they ask you where the panel truck was during this questioning a few days before?

A. Yes, sir.

Q. And had you told them where it was?

A. Yes, sir.

Q. All right, and did they look in the panel truck?

A. Yes, sir.

Q. All right, and did they ask you if it was all right to look in the truck when they got up there, Marvin?

A. No, sir.

Q. Were you there when they looked in the truck?

A. Well, I was there when he started.

Q. When they started?

A. Yes, sir.

Q. And did you stay there until they finished?

A. Well, I stayed back out there; I wasn't right up at the truck.

Q. You weren't? Where were you?

[fol. 499] A. Well, I was standing back out there pretty close to a building.

Q. Who was out there with you?

A. Nobody.

Q. Nobody?

A. No, sir.

Q. All right, and where were these other fellows?

A. They was in the truck, looking in the truck and looking around it.

Q. About how far away from you were they?

A. Oh, about as far as from here to that door there, I suppose.

Q. Now had you been over there by the truck when they started, you say?

A. Yes, sir.

Q. Why did you leave?

A. Well, he said something about some shoes or something, and I went to explain to Ranger Woods about them, what they were doing in there, and he told me to get my so-and-so over there and get out of the way.

Q. And that is what you did then?

A. Yes, sir.

Q. You know how long you stayed there?

A. Stayed there in Borger?

[fol. 500] Q. No, out there where the truck was.

A. I imagine it would have to be, oh, it was around an hour or maybe longer.

Q. All right, and was that out at the company you worked for? Where was it in Borger?

A. It was setting down behind a—well, there was a little apartment house there where some of the boys stayed at, and the boys that stayed there had it while I was in jail.

Q. All right, and they had the truck then. That was your truck, wasn't it?

A. Yes, sir.

Q. You owned it.

A. Yes, sir.

Q. All right. Where did you go then when you left the truck?

A. They carried me up to the city police station and locked me up.

Q. City police station?

A. Yes, sir.

Q. And did they tell you where they were going?

A. Well, no, sir, they didn't. They just carried me up there and locked me up.

Q. About what time of day was that?

A. I guess it was around twelve, right at twelve, anyway.

[fol. 501] Q. Did you have anything to eat up there?

A. Well, I had some milk up there. One of the city polices brought me some milk while I was in there.

Q. All right, did you stay in there very long?

A. Oh, about an hour, I imagine, maybe not that long.

Q. Maybe not that long?

A. No, sir.

Q. All right, when you left there where did you go?

A. We came back to Midland.

Q. You were still sitting in the back seat?

A. Yes, sir.

Q. Who sat with you this time?

A. Sgt. Morales.

Q. All right. On the way up to Borger, Marvin, in that car, did they talk to you about this thing some then?

A. Yes, sir, Sgt. Morales did a little bit.

Q. All right, on the way back from Borger did he talk to you about it?

A. Yes, sir.

Q. What was he trying to get you to do then?

A. Well, he was still talking the same thing about signing a confession, that I choked my wife and I didn't shoot her.

Q. That was what he was saying?

[fol. 502] A. Yes, sir.

Q. All right. Now did Sgt. Morales threaten you on that trip?

A. Well, he cursed me a couple of times and, I don't know, he would say something to me and I guess I wouldn't pay him no attention, which I tried not to hear what he was saying, and he drawed back a couple of times.

Q. He drawed back a couple of times?

A. Yes, sir.

Q. With his hands?

A. Yes, sir.

Q. Never did strike you.

A. No, sir.

Q. Now then, you came straight on back to Midland?

A. Yes, sir.

Q. Didn't stop anywhere?

A. Yes, sir,

Q. Where did you stop?

A. Out at the Public Safety Building.

Q. Same place?

A. Yes, sir.

Q. Now, you know what time that was?

A. No, sir.

Q. Ranger Wood drive pretty fast coming back?

[fol. 503] A. Yes, sir.

Q. Now, what happened then?

A. Well, they carried me back in this office back there and this Mr. Reed, he started questioning me.

Q. Mr. Reed?

A. Yes, sir.

Q. Did he give you some more of those tests?

A. Yes, sir.

Q. All right, about how long did that go on?

A. Well, I don't know. Seemed like it went on quite a while.

Q. Good long time.

A. Yes, sir.

Q. Then what happened?

A. Well, he just asked me these questions.

Q. Same kind of questions?

A. Yes, sir.

Q. Did you answer them?

A. I answered them the best I could. I told them I didn't know nothing about my wife and the death of my wife, but he insisted that I did.

Q. All right, did anybody else talk to you out there?

A. Yes, sir.

Q. Who?

[fol. 504] A. Ranger Wood and Sgt. Morales.

Q. All right, what did they say to you?

A. About the same thing, and Sgt. Morales, he said that I killed my wife and he knowed I killed her, and I wasn't leaving there until they got what they wanted.

Q. All right, about the same thing they said the other time?

A. Yes, sir.

Q. Did Sgt. Morales say anything else to you?

A. Yes, sir.

Q. In the nature of a threat of any kind?

A. Well, he said that he knowed that I was—well, he threatened me and he called me names.

Q. Did he call you names?

A. Yes, sir.

Q. Did he do anything else?

A. Sgt. Morales?

Q. Yes.

A. Yes, sir.

Q. What?

A. Well, he—well, I don't know whether he said he would hit me or what, but, in other words, he pushed me back and, I don't know, I guess it's what you'd call a turn to hit me. He got mad at me because I wouldn't—he said I [fol. 505] killed my wife?

Q. He got mad at you?

A. Yes, sir.

Q. Did he say anything about how long he was going to talk to you, or anything like that?

A. Well, yes, he said I wasn't leaving there until they got what they wanted.

Q. All right. Now then, anything else he said in the nature of a threat?

A. Yes, sir.

Q. What?

A. Well, he called me a black so-and-so.

Q. Did he call you several names like that?

A. Yes, sir.

Q. Now that was Sgt. Morales.

A. Yes, sir.

Q. Now did Ranger Wood threaten you in any way?

A. Yes, sir.

Q. What did he say to you?

A. He said if I didn't tell them what they wanted they's going to take me back out there to the grave and beat my so-and-so, and he asked me didn't I believe it.

Q. That same thing he told you about the Monday before when you were out there?

[fols. 506-507] A. Yes, sir.

Q. All right, and did he say anything about he was tired of fooling around with you?

A. Yes, sir, he didn't exactly say fooling around; he said it in another manner or so.

Q. All right, did he hit you?

A. No, sir, he drawed back at me, but he never did hit me.

Q. He never did hit you.

A. No, sir.

Q. Now did anybody else threaten you or do anything to you out there that day?

A. Yes, sir.

Q. Who was that?

A. This polygraph operator, Mr. Reed.

Q. Did he talk to you a long time there?

A. Yes, sir.

Q. And what did he say to you?

A. Well, he cursed me and called me names, and he told me they was going to get what they wanted one way or another.

Q. One way or another.

A. Yes, sir.

Q. All right. Now did he do anything else?

A. Well, he asked me did I kill my wife and I said no,

[fol. 508] Q. All right. Did he hurt you when he hit you?

A. Yes, sir, when he hit me in the stomach.
Q. Did it knock you out of the chair?
A. Yes, sir.
Q. Did you get up then?
A. Yes, sir.
Q. Now, Marvin, how long after that then did you give them another statement?
A. I gave them a statement right after that.
Q. All right, and why did you give them that statement?
A. Well, I was tired and I just felt like I couldn't take no more, so I just went on and gave him a statement, and I was hurting so I didn't figure I had no choice.
Q. Did you give him then the statement that he wanted?
A. Yes, sir, I guess he did. He——
Q. Who did you give the statement to?
A. Well, he told me——
Q. Who is "he" now?
A. This polygraph operator. He told me to tell it to Sgt. Morales, and they had me to go into an office and so I—
Q. Did somebody ask you questions again?
A. Yes, Sgt. Morales asked them, asked part of them.
Q. Who asked the other part?
A. That—this, oh, Mr. Ranger or Mr. Woods.
[fol. 509] Q. Mr. Woods?
A. Yes, sir.
Q. And did somebody take that down and type it up?
A. Yes, sir.
Q. All right, do you know who that was?
A. No, sir. She was a lady, but I don't know who she was.
Q. Did you sign that statement then?
A. Yes, sir.
Q. Was it nighttime by then, Marvin?
A. Yes, sir.
Q. And had you been out there a good long time?
A. Yes, sir.
Q. Now what happened after that, Marvin?
A. Well, after that they brought me back down here to the city, and they locked me up then.
Q. They locked you up again?
A. Yes, sir.
Q. Did they question you any more that night?

A. No, sir.

Q. Did they question you any more the next day?

A. No, sir.

Q. The next day was Friday. What happened then?

A. Well, they—I forgot who it was, but some of them [fol. 510] they brought me over here to the county.

Q. To the county?

A. Yes, sir.

Q. And then you were up here in the county jail for a few days. Is that right?

A. Yes, sir.

Q. Now, Marvin, had you—when you came over here to the county, did you eat? Did they give you food?

A. Over here at the county?

Q. Yes.

A. Yes, sir.

Q. Did they feed you along with the rest of the prisoners?

A. Yes, sir.

Q. Were you in a cell by yourself or were you with others?

A. I was with other prisoners.

Q. With other prisoners.

A. Yes, sir.

Q. All right, you were up here in the tank, I believe they call it. Is that right?

A. Yes, sir.

Q. Now, you have heard Mr. Howell testify up here this morning, and did you talk to Mr. Howell and Mr. Fletcher then on Tuesday as you said you did?

[fol. 511] A. Well, I talked to them one day. I don't know what day it was.

Q. You don't know what day it was.

A. No, sir.

Q. All right, where did you talk to them?

A. That was downstairs, I think; now, I'm not sure, but I think it was down—yeah, it was downstairs.

Q. In the sheriff's office?

A. I guess it was; I don't know where the sheriff's office is, but it was downstairs.

Q. Well, was it the same room that you came to that night, or was it another room, or what? I mean that night you came in from Borger.

A. It was the same room.

Q. All right, and the same room where Mr. Kirksey talked to you.

A. Yes, sir.

Q. Now then, you gave them a statement then. Mr. Howell testified that it had been marked State's Exhibit 13. Is that right?

A. I gave them a statement.

Q. You did?

A. Yes, sir.

Q. Is that the one that you've signed?

[fol. 512] A. Yes, sir, I think so, but I'm not sure.

Q. Now then, Marvin, did you tell them about the same thing you had told these other officers on Thursday night?

A. Yes, sir, just about the same thing. That's the way they——

Q. When Mr. Howell talked to you, Marvin, did he threaten you or abuse you in any way?

A. No, sir.

Q. Now was this statement true?

A. No, sir.

Q. Now when Mr. Howell came or had you down there, he said he mentioned something to you that when you first came down there that you stated you didn't kill your wife. Is that right?

A. Yes, sir.

Q. And then he said they talked to you for awhile, I think he said, or I may be wrong, something like thirty-five or forty-five minutes down there, and that he then called Mr. Mims and he came down there. Is that right?

A. Yes, sir.

Q. And that he had told you something about taking a polygraph test.

A. Yes, sir.

Q. Now did you tell them about these other officers?

[fol. 513] A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. They talked to you about that. Is that right?

A. Yes, sir.

Q. And you told them while you were down there, until

you talked to Mr. Mims, that you didn't know anything about it. Is that right?

A. Yes, sir.

Q. Well, Marvin, why did you change your mind, and why did you give them this statement, and why did you sign that statement?

A. Well, I had already been through that once, and those other officers told me the same thing, that nothing was going to happen to me, they wasn't going to do this and they wasn't going to do that, but they did, so they went and got Mr. Mims.

Q. Went and got Mr. who?

A. Mr. Mims; anyway, the district attorney.

Q. All right.

A. So I was scared because I figured the same thing that those other officers done to me, that they would do the same thing; so I had already signed two statements and I didn't figure it made much difference, because those other officers [fol. 514] said that they wouldn't beat me or nothing but they did, so I figured they would do the same thing.

Q. Now was Sgt. Morales pretty nice to you that first morning when you went down there?

A. Yes, sir. He talked nice.

Q. Marvin, I asked you why you signed this statement, and I believe you said something to the effect that these two officers talked to you and Mr. Mims came down there.

A. Mr. Mims came down there and I could see it all over again, the same thing. I went three or four days already on the same kind of thing and they, the other officers, said that they wouldn't do this and wouldn't do that but they did, and I didn't have no reason to believe they wouldn't be any different than them. I didn't think I could go through that kind of punishment again, so I had signed one statement, two statements, at least, and I didn't figure it made much difference.

Q. All right, and that's the only reason you signed this statement?

A. I was scared. I was scared they would do the same thing.

Q. Are you telling this jury, Marvin, that that statement is not true?

A. No, sir, it's not true. None of them are true.

[fol. 515] Q. Now, Marvin, I want you to look at this jury when you answer this question, and tell this jury: Marvin, did you kill your wife?

A. No, sir, I did not kill my wife.

Q. Were you there when your wife died, if she died.

A. I can't answer that because I don't know.

Q. Did you see her die?

A. No, sir.

Q. Did you see her hurt?

A. No, sir.

Q. Did you do anything which might have killed her?

A. No, sir.

Q. Now, Marvin, you know, don't you, that there are probably fifteen police officers out here ready to say that they didn't do anything to you?

A. Yes, sir, I know that.

Q. And you have known that all along, and you and I have talked about that, haven't we?

A. Yes, sir.

Q. But it is still your choice to come up here and tell the jury just what happened. Is that right?

A. Yes, sir.

Q. Have you told the truth on this witness stand, Marvin Clewis?

[fol. 516] A. I have told the truth. That is why I wanted to tell it, because it is true.

Mr. Legg: Your witness.

Cross-examination.

By Mr. Smith:

Q. Mr. Clewis, did they abuse you in Borger?

A. No more than what I said that Sgt. Wood said.

Q. Did they threaten you in any way up there?

A. Well, he did tell me to get my so-and-so out of the way and go somewhere.

Q. Did he draw back as if to hit you up there?

A. Yes, sir.

Q. He drew back as if to hit you.

A. Yes, sir.

Q. All right. What about Mr. Morales? Did he slap you up there?

A. No, sir.

Q. Did you have visitors up there in Borger?

A. No, sir.

Q. Is it true, sir, that you visited with either some of your friends or some of your relatives or some of your inlaws there at Borger while you were there?

A. I didn't visit with anyone. I seen all of them standing out there, but I wasn't allowed to talk to them.

[fol. 517] Q. You weren't allowed to talk to them.

A. No, sir.

Q. And you say you did not give permission for them to search your truck. Is that right?

A. No, sir, I didn't.

Q. Isn't it a fact, Mr. Clewis, that you gave written permission for them to search your truck?

A. I did not give written permission for them to search my truck.

Q. You said that when you returned to Midland you went out to the Department of Public Safety with Mr. Reed and that he gave you some tests. Is that right?

A. Yes, sir.

Q. How long did those tests last, please?

A. Just like I say, I don't know for sure.

Q. Well, you knew for sure that when they questioned you at the police station on Monday night it was from one hour to two hours or longer at a time. Was this from one hour to two hours or longer at a time on each test out at the Department of Public Safety?

A. Well, I would say it was from an hour, two hours, or something like that.

Q. Each test that Mr. Reed ran on you?

A. Well, I didn't understand the test, and I don't know [fol. 518] when he was finished with a test.

Q. You didn't know when he was starting a test?

A. No, sir.

Q. And you didn't know when he was ending a test.

A. No, sir.

Q. Isn't it true, sir, that when they are running a test on you they put a little rubber innertube of a thing around your arm?

Mr. Legg: Now, your Honor, I want to object to any testimony about an innertube.

The Court: Sustained.

Q. There is no way at all you can tell when they begin a test and when they end a test. Is that right?

A. Well, there's not. He was asking me questions all the time, so I figured as long as they were asking me questions they was, whatever you call it, doing it.

Q. Didn't they give you some rest periods out there, Mr. Clewis?

A. Well, I don't know——

Q. Sir?

A. I say, I don't know what you mean by rest periods. He would go out and talk to those other officers and come back in there.

Q. Would they leave you alone by yourself in that room some?

[fol. 519] A. Yes, sir.

Q. How long would they leave you at one time in that room?

A. I'd say sometimes maybe five and maybe ten minutes, but wouldn't be for sure.

Q. All right. Well, were you resting while they were doing that or not? During that five or ten minutes, were you resting?

A. I was in there. Now I wouldn't say I was resting.

Q. All right, were you working?

A. I was sitting up scared, that's all I know.

Q. You were sitting there scared.

A. Yes, sir.

Q. Was there a pad in that chair you were sitting in, sir?

A. No, sir.

Q. No pad in that chair.

A. No, sir.

Q. All right, sir.

Mr. Legg: Your Honor, I want to object to that question and ask that it be stricken, and the answer to the question be disregarded, too. It is not material to any issue in this case.

Mr. Smith: It bears on whether he was mistreated or not, [fol. 520] your Honor, whether he was resting or not. It is directly in point on what they brought out on Direct.

The Court: The Court can't comment on the question. Get on with the case.

Q. All right, sir. Mr. Clewis, isn't it true that you threatened Dorothy Mae Clewis on many occasions?

A. No, sir, it's not true.

Q. Isn't it true, sir, that in January of 1962 that, in the presence of Rachel Garnett, mother of Dorothy Mae Clewis, you threatened to kill Dorothy Mae Clewis?

A. No, sir, it's not true.

Q. And Shirley Jean Judie was the first one to report her mother missing, wasn't she?

A. Yes, sir, I suppose so.

Q. At the city jail the officers gave you special food; the city jail here in Midland gave you special food, didn't they, sir?

A. I didn't get it, if they did.

Q. You didn't get any soup, milk or anything of that nature?

A. No, sir.

Q. All officers treated you real bad. Is that right, Mr. Clewis?

A. No, sir, not all of them. I wouldn't tell a story on [fol. 521] them. They all didn't treat me bad.

Q. Mr. Morales treated you bad?

A. Yes, sir.

Q. Mr. Wood treatd you bad?

A. Yes, sir.

Q. The big man with the pipe treated you bad?

A. No, sir.

Q. He didn't treat you bad.

A. No, sir.

Q. Did he question you for long periods of time?

A. Yes, sir, he questioned me for a pretty good while, but he didn't treat me bad.

Q. Did they keep you up until after midnight at the city jail?

A. As close as I could tell the time, it was after midnight. Just like I say, I didn't have a watch and I couldn't——

Q. Was your answer to the question, sir, that to the best of your belief they did keep you up past midnight, or they did not?

A. I believe they did keep me up after midnight.

Q. All right, was that midnight of Sunday night?

A. Yes, sir.

Q. And what about midnight, past midnight on Monday night?

A. Yes, sir.

[fol. 522] Q. What about midnight of Tuesday night?

A. Well, I would say it was around 12:00 o'clock or 1:00 o'clock, or something. It was after 12:00 o'clock, I am pretty sure.

Q. Did I understand you to testify that it was around 2:00 or 3:00 o'clock on Monday night, I mean, past midnight Monday night to 2:00 or 3:00 o'clock in the morning on Tuesday morning?

A. That's still past 12:00.

Q. You had visitors on Sunday afternoon. Correct, sir?

A. Yes, sir.

Q. You had visitors on Monday night, didn't you, sir?

A. I don't remember whether I did or not.

Q. I am sorry, sir. Pardon? Didn't Elizabeth Johnson visit you on Monday night?

A. Well, I don't remember that. I know that on Monday night we came from out there at the Public Safety, and I called her and I didn't get her.

Q. You made a phone call.

A. Yes, sir.

Q. You didn't get her.

A. No, sir. I was at the jail house then.

Q. What about Thursday night? Did you make a phone call?

A. Thursday night?

[fol. 523] Q. Yes, sir.

A. No, sir.

Q. Isn't it true, sir, that you made a phone call from the desk there in the city police station?

A. No, sir. I never made but one phone call while I was there.

Q. All right, sir. Now, isn't it true, sir, that when you were in the city jail, you had a bed all day long.

A. A bed was in the cell, but I wasn't in it.

Q. I see. By a "bed," I mean the mattress or whatever

it is they have there. It was there during the day as well as the night.

A. Oh, yes, sir.

Q. When you came to the county jail here in the courthouse, you came on Friday. Right?

A. Yes, sir, I think so. I am not much sure, but I believe that's right.

Q. And they treated you real nice.

A. Yes, sir.

Q. Nobody bothered you on Friday?

A. No, sir, not as I remembers.

Q. Saturday?

A. No, sir.

Q. Sunday?

[fol. 524] A. No, sir.

Q. You remember those people coming up there Sunday to hold church services, don't you?

A. Yes, sir.

Q. Nobody mistreated you on Monday?

A. No, sir.

Q. And nobody mistreated you on Tuesday. That was the Tuesday while you were here at the county, I am talking about.

A. No, sir.

Q. All right, and you had plenty of food.

A. Yes, sir.

Q. While you were here at the county. Plenty of rest?

A. Yes, sir.

Q. None of these officers that you have been testifying about came here to the county to see you, did they, sir?

A. They didn't come to see me.

Q. Did you see them?

A. Well, just like I said once before, I thought and I still think I saw Sgt. Morales when I was downstairs, but I wouldn't swear I did and I wouldn't swear I didn't.

Q. Did he say anything to you?

A. Well, I seen him somewhere. It might have been when I was getting out, but I seen him over here, but I ain't going to swear when it was.

[fol. 525] Q. When you were leaving the city jail, you mean you think you saw him?

A. Well, I said it could have been then or it could have been when I came down. I just don't know——

Q. Excuse me, go ahead.

A. I says I just don't know, but I seen him over here.

Q. Isn't it a fact, sir, that at the city jail you saw a lawyer?

A. I saw a lawyer over there.

Q. And you talked to him alone, didn't you, sir?

A. Yes, sir.

Q. You remember his name?

A. Yes, sir.

Q. Who was it?

A. Mr. Harris.

Q. All right, sir. That was on Thursday morning, wasn't it, sir, over at the city jail when you saw him?

A. Well, I don't know, sir, when it was, but whenever it was I had made two statements.

Q. Oh, you are sure you had already made two statements.

A. Yes, sir, I had made two statements whenever it was.

Q. I see. But you did see him before you made Statement 3. Is that right?

A. Yes, sir.

[fol. 526] Q. Now did you tell Mr. Legg that in Statement No. 1 that you said that you and Dorothy Mae were tussling over the gun?

A. Yes, sir.

Q. And isn't it true, Mr. Clewis, that you also said you were tussling here in Statement No. 3?

A. I probably have; I don't know.

Q. And they put this word "tussling" into your mouth. Is that right, sir?

A. I don't know whether he put it in there or not.

Q. I see. You had visitors on Friday, too, over at the city jail, didn't you, sir?

A. On Friday?

Q. At the city jail on Friday before you came over here to the county jail.

A. If I do I don't remember. Who was it?

Q. You don't recall?

A. No, sir.

Q. Could it have been Mabel Webster?

A. Well, if it was, she wasn't there that Tuesday or Wednesday, whenever I said it. She only visited me once, so, if it was on Friday, it wasn't that day.

Q. What about Elizabeth Johnson? Did she visit you over there at the city jail?

[fol. 527] A. Yes, sir, she visited me. She visited me that Sunday.

Q. Did she visit you on that Friday when you left the city jail?

A. I don't remember that either. I don't remember having any visitors on Friday.

Q. You talked to the newspaper reporter, didn't you, sir?

A. I might have. If I did, I didn't know it.

Q. Isn't it true you talked to Mr. Cope Routh on Tuesday morning?

A. I might have, but I still thought he was an officer if I did talk to him.

Q. All right, sir. Did you hear Linda, your daughter, talking about Dorothy Mae going with other men?

A. Yes, sir.

Q. Did you know about that?

A. I had heard it.

Q. That she was going with other men?

A. Yes, sir. Her mother told me that out of her own mouth.

Q. Isn't it true that you told Dorothy Mae Clewis that if she didn't stop running around with other men that you were going to kill her?

A. No, sir, I did not.

[fol. 528] Q. Isn't it also true, sir, that you told Dorothy Mae Clewis that "if I catch you and Jimmy Davis together, I'll kill both of you"?

A. No, sir, I didn't say that either.

Q. Isn't it also true, sir, that from time to time you would take Dorothy Mae Clewis out in the country and whip her?

A. I never have did that. That's not true.

Q. I beg your pardon, sir.

A. I said that's not true.

Q. Isn't it true, sir, that you whipped her with a rubber hose?

A. That's not true.

Q. And you were choking her that night out behind the apartment with your hands.

A. No, sir, that's not true.

Mr. Legg: Your Honor, I want to impose an objection here. I didn't catch what Mr. Smith was saying. He asked him a question if he didn't take her out in the country from time to time and whip her. Now the State has presented its evidence in this case and has presented not one shred of evidence of anything like that. It is highly prejudicial, it is without foundation on a basis of fact, and we ask that the jury be instructed not to consider that statement by the prosecutor for any purpose.

[fol. 529] Mr. Smith: If the Court please, this is Cross Examination. We are allowed a wide range. That is the purpose of cross examination. It is proper in every way.

The Court: The Court cannot comment as to whether that is in the record, other than to refer the jury to the fact that you have heard all of the evidence from the witnesses here, and you are the sole judges of the credibility of the witnesses and the weight to be given their testimony. That is all the Court can say.

Mr. Smith: Yes, sir, and there is another point of law I didn't raise but should have. It doesn't make any difference, your Honor, whether—this is a part of my objection, I mean part of my answer to his objection, your Honor, a continuation,——

Mr. Legg: Your Honor, if we are going to discuss what the law is——

The Court: The Court will say to stay within the record. Let's get on with the case.

Mr. Smith: On Cross Examination stay within the record, sir?

The Court: Stay within the record.

Mr. Smith: Yes, sir.

Q. Isn't it true that Dorothy Mae Clewis drank wine?

A. She drank wine and beer, too, and whiskey, too.

[fol. 530] Q. Is it true, sir, that you went out to Pinkie's, county line, to buy her some wine?

A. No, sir, that's not true.

Q. You never have done that.

A. I never have went out and bought her no wine, but she has drinked it.

Q. Well, did she ever go out with you and the two of you buy it together?

A. No, sir.

Q. Isn't it true, sir, that you had trouble sleeping because this killing was on your conscience, sir?

A. No, sir, I never have no trouble sleeping.

Q. Didn't you have trouble sleeping at the police station on Monday night?

A. Had trouble sleeping at the police station?

Q. At the police station on Monday night?

A. Yes, sir, I did.

Q. Did you have trouble sleeping at the police station on Tuesday night?

A. If you was locked up some place like that and everybody against you, wouldn't you be scared, too?

Q. If I had killed my wife, it would be on my conscience, too, Mr. Clewis.

A. I didn't kill my wife. I was just scared.

[fol. 531] Q. Where were you living, please, sir, on July of 1962?

A. July? I was living in Borger.

Q. I see. I thought you said you were home when Morales came to get you.

A. You said in July. In July, 1962, I was working in Borger, Texas. I came home that Saturday night.

Q. All right, sir. Where was home, please?

A. Well, my home would be Borger, but when I came back down here I went over to Elizabeth Johnson's residence.

Q. When you went over to Elizabeth Johnson's residence, you were not referring to that as home. Is that correct?

A. No, sir, that wouldn't be home.

Q. What did you mean, please, sir, when you said you came home to Midland?

A. Well, I figure Midland is my home since I've stayed here and every time I finish a job I come back here.

Q. And every time you finished a job in 1962, where would you come when you would come to Midland?

A. I'd come to 1114 East Estes part of the time, and then part of the time I'd go to my sister's house.

Q. I see. All right, when did you first start coming to 1114 East Estes Street, sir, in 1962?

A. I don't remember that.

Q. How long have you been working for Vaughn & Tay-
[fol. 532] lor Construction Company, sir?

A. Going on ten years.

Q. And this is working out on the pipe line itself?

A. Yes, sir.

Q. Is that hard work or otherwise?

A. Well, part of it is hard and part of it is not.

Q. Do you work with heavy machinery, or do you carry the items by hand?

A. Well, we use both of them, by hands and by heavy machinery, too. We have all kind of machinery there.

Q. Would you call it heavy work, Mr. Clewis?

A. Well, I would, and anybody that worked on the pipe line, I think, would.

Q. The fact that your wife went with other men did not make you jealous?

A. Well, I didn't approve of it, but I didn't see it.

Q. Isn't it true, sir, that you were arguing with Dorothy Mae Clewis about your ex-wife?

A. No, sir, that's not true. Me and my ex-wife wasn't even speaking and hardly ever do speak.

Q. I see. Was it your ex-wife who came to the jail to see you, sir?

A. Yes, sir.

Q. Mr. Clewis, then it is your testimony that Wood, [fol. 533] Morales, Reed, abused you physically and cursed you. Is that correct, sir?

A. Yes, sir.

Q. Threatened you.

A. Yes, sir.

Q. And what other officers abused you and cursed you?

A. Those were the only three.

Q. No one else hit you.

A. No, sir.

Q. But the others would talk to you late at night. Is that correct?

A. Yes, sir.

Q. Some of them past midnight.
A. Yes, sir.
Q. Is that right, sir?
A. Yes, sir.
Mr. Smith: We have no further questions, your Honor.

* * * * * * *

[fol. 534] Lucille Holiday, a witness called by the Defense, after first being duly sworn, testified upon the merits of the case, as follows:

Direct examination.

By Mr. Legg:

Q. Tell the jury your name, please, ma'am.
A. Lucille Holiday.
Q. Lucille what?
A. Holiday.
Q. How do you spell it?
A. H-o-l-i-d-a-y.
Q. H-o-l-i-d-a-y?
A. Yes, sir.
Q. All right. Where do you live?
A. 310 North Carver.
Q. 410 North Carver?
A. 310.
Q. 410, all right.
[fol. 535] A. 310.
Q. 310 North Carver. All right, and how long have you lived in Midland?
A. Been here since '31.
Q. Since 1931?
A. Yes.
Q. Have you lived at that same place all that time?
A. No, I lived out in service.
Q. Lived where?
A. I lived at town in service.
Q. How long have you lived at this place?
A. Since '43.

Q. Since 1943. Now, back in January of 1962, you were living there at the same place?

A. Yes, sir.

Q. Were you a neighbor or lived close to the place where Marvin Clewis and Dorothy Mae Clewis lived?

A. Yes, sir.

Q. Did you see Dorothy Mae Clewis pretty frequently?

A. Yes, sir.

Q. How often would you say, on an average, did you see Dorothy Mae?

A. Nearly every day.

Q. Nearly every day?

[fol. 536] A. Yes.

Q. Do you remember the last time you saw Dorothy Mae Clewis?

A. It was on Friday evening.

Q. One Friday evening? You know what day it was?

A. It was on Friday.

Q. Could it have been back in January of this year?

A. This year?

Q. No, I mean of 1962, two years ago, two and a half years ago.

A. I don't know. She come there on Friday evening, and I never did see her no more after then.

Q. She came down there one Friday evening and you never did see her any more?

A. No, sir.

Q. All right, and did anything happen while she was down there Friday evening?

A. Yes, sir, she showed me some money she got.

Q. Did she tell you how much money it was?

A. $150.00.

Q. Did she tell you where she got it?

A. Off a drunk man 'sleep.

Q. Off a drunk man?

A. Yes, sir. He was asleep.

[fol. 537] Q. All right, did you say anything to her about that?

A. I just asked her was she scared and she said no, she was leaving that night, and I never did see her no more.

Q. She said she was leaving that night.

A. Yes, sir.

Q. And you never did see her after that.

A. No, sir.

Q. Were you at her house the next day?

A. Yes, sir.

Q. And when was it, do you know?

A. Now the next morning, I think, I went over there and ironed the little girl a blouse to wear to school.

Q. Ironed the little girl a blouse to wear to school. And what was the little girl's name?

A. Linda.

Q. Did you know her pretty good?

A. Yes, sir.

Q. And that's the last time you ever saw Dorothy Mae.

A. Yes, sir.

Q. Did you see Dorothy Mae and Marvin together a good bit or not?

A. Marvin?

Q. Marvin Clewis, her husband,

A. Yes, sir, I've seen them together while they was living [fol. 538] out there when he would come home sometimes off of his job.

Q. All right. Now, did you know both of them pretty good?

A. Yes, sir.

Q. Did you like both of them all right?

A. Yes, sir.

Q. Were you around both of them a lot?

A. Yes, sir.

Q. Did you have any opinion, Miss Lucille, as to whether or not Marvin was good to Dorothy Mae?

A. Yes, sir. She told me he was. They never did have no argument around me.

Q. All right, did you ever know of them having any arguments?

A. Not as I know of.

Q. Did Dorothy Mae ever tell you about any arguments she was having with Marvin?

A. No, sir.

Q. Did she ever tell you that he hit her, or anything like that?

A. No, sir.

Q. And you saw her nearly every day.

A. Yes, sir, nearly every day.

[fol. 539] Q. And you never did see her after that Friday evening.

A. No, sir, I never did see her no more.

Q. And she told you she was leaving that night?

A. Yes, sir.

Q. Now, Miss Lucille, when was the first time you talked to me about this?

A. Today, I think it was.

Q. Today?

A. Yes, sir.

Q. As a matter of fact, it was just about an hour or two ago, wasn't it?

A. Yes, sir.

Q. And you came to my office. Is that right?

A. Yes, sir.

Q. Now did Marvin ask you to come up here and testify?

Mr. Smith: If it please the Court, that is going far afield.

Mr. Legg: All right, we will withdraw that question. I believe that is all.

Mr. Smith: We have no questions.

(Witness excused)

[fol. 540] C. E. Sayles, called by the Defense as a witness, after first being deuly sworn, testified upon the merits of the case, as follows:

Direct examination.

By Mr. Legg:

Q. What is your name, please, sir?

A. C. E. Sayles.

Q. And what is your business?

A. Superintendent for a pipe line construction.

Q. And what company do you do your work for?

A. Monarch Constructors.

Q. All right, did you work previously for Vaughn & Taylor Construction Company?

A. Yes, sir.

Q. And how long did you work for them?
A. About fifteen years.
Q. You say you work as a superintendent?
A. Yes, sir.
Q. For pipe line construction.
A. Yes, sir.
Q. Do you know Marvin Clewis seated over here?
A. Yes, sir.
Q. How long have you known Marvin?
A. Approximately eight years.
[fol. 541] Q. All right, and during that period of time, in what capacity have you known him?
A. I have had him on various jobs as foreman.
Q. And is that in various places over the country?
A. Yes, sir.
Q. Has he been a good worker?
A. Very good.
Q. Has he been a regular worker?
A. Yes, sir.
Q. Did he have any kind of record of absenteeism anywhere you went on a job?
A. No, sir, he was always very good.
Q. All right, did he ever exhibit in that capacity, Mr. Sayles, any tendencies toward violence or anything of that nature?
A. Never to my knowledge, no, sir.
Q. Would you say that he had an even temper or high temper or what?
A. No, sir, to me he was very good temper. I mean, even.
Q. All right, did he ever seem to have any trouble with the people working with him, losing his temper or anything like that?
A. No, sir, none whatsoever.

Mr. Smith: Your Honor, I hate to object. It is all in-
[fol. 542] admissible. It keeps going on and on.
The Court: Sustained.

Q. Mr. Sayles, let me ask you one more question about his work. What were the working days or working hours of Marvin Clewis while he was working for you?
A. Some days on jobs we would work maybe thirty days when he wouldn't be off and nine or ten hours a day.

Q. Including Sundays?
A. Yes, sir.
Q. Saturdays?
A. Yes, sir.
Q. So he just had to work just whatever the job called for. Is that right?
A. That's right.
Q. Now, Mr. Sayles, were you acquainted with the reputation of Marvin Clewis for truth and veracity in the places where he lived under your supervision?
A. Yes, sir.
Q. And was that reputation, Mr. Sayles, good or bad?
A. It has been very good, to my knowledge. I never had any trouble whatsoever.
Q. All right, and he always told you the truth.
A. Yes, sir.
Q. Now would you believe what he told you?
[fol. 543] A. I certainly would. I would trust him with anything I have.

Mr. Legg: I believe that is all.
Mr. Smith: We have no questions, Mr. Sayles.

D. D. VAUGHN, called by the Defense as a witness, after first being duly sworn, testified upon the merits of the case, as follows:

Direct examination.

By Mr. Legg:

Q. State your name, please, sir.
A. D. D. Vaughn.
Q. And where do you live, Mr. Vaughn?
A. 127 Casa Grande, Odessa, Texas.
Q. And what is your business or occupation?
A. Construction work contractor.
Q. What is the name of your construction company?
A. Vaughn & Taylor Construction Company.
Q. Are you acquainted with Marvin Clewis?
A. Yes, sir.

Q. Is he employed by your company at this time?

A. Yes, sir.

Q. And for how long has he been employed by your company?

A. Approximately ten years.

[fol. 544] Q. Now, Mr. Vaughn, there has been some question raised in this case as to whether Marvin Clewis was a regular worker.

A. Yes, sir.

Q. Can you tell me whether or not he was a regular and dependable worker?

A. Very dependable and regular at all times, very dependable.

Q. Now during the time, Mr. Vaughn, since he was charged, as you know, with the murder of his wife, has he continued to work for your company?

A. Yes, sir.

Q. Has he worked just as diligently then?

A. Very satisfactory at all times.

Q. Now, Mr. Vaughn, in your experience with Marvin Clewis, has he ever demonstrated any qualities of uneven temper or anything of that nature?

A. None whatsoever.

Q. Did he start out with you as a foreman?

A. Oh, no, not at the present time, but he built up pretty soon after he come to the company.

Q. Pretty soon after he went to work for you.

A. Yes, sir.

Q. And you have kept him on the payroll then for nearly ten years. Is that right?

[fols. 545-551] A. Yes, sir.

Q. Are you acquainted, Mr. Vaughn, with his reputation as a man of truth and veracity?

A. In our relation in the work within the jobs, I would say it is excellent. His reputation is excellent, and all the years I have never had any delays or trouble of any kind of him getting in jail or drinking or getting drunk, and stuff like that, never.

Q. Of course, you do have some of that trouble sometimes with some of your——

A. Yes, sir, we sure do.

Q. But he has been a dependable worker.

A. He certainly has.
Q. And a hard worker.
A. A good worker.
Q. Can you believe what he tells you?
A. Yes, sir.

Mr. Legg: I believe that is all. Pass the witness.
Mr. Smith: We have no questions. Thank you, sir.

[fol. 552] RACHEL GARNETT, called by the State as a witness, after first being duly sworn, testified upon the merits of the case, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.
A. Rachel Garnett.
Q. And where do you live, Mrs. Garnett.
A. At 300 South Marshall.
Q. All right, did you know Dorothy Mae Clewis?
A. Yes, sir, that's my baby girl.
[fol. 553] Q. Your baby girl?
A. Yes, sir.
Q. Do you know Marvin Clewis?
A. I sure do: I've known him ever since '54.
Q. All right, and how long have you been living here in Midland, please?
A. Ever since '57.
Q. Did you know Marvin Clewis and Dorothy Mae Clewis when they were living over here in those apartments on Davis Street—I think it is Davis—in January of 1962?
A. That's right.
Q. Did you ever have occasion to be around them over there?
A. Yes, I did.
Q. Will you tell this jury of any trouble, if any, that you had seen between Marvin Clewis and Dorothy Mae Clewis?
A. Well, he always threatened her, and I asked him——

Mr. Legg: Now, your Honor, we must ask that this be

confined to certainly somewhere approximating or within a reasonable recency of January 21, 1962, the date alleged in this indictment.

Mr. Smith: Your Honor, any time prior to the alleged killing is admissible. I am asking her about January, but any time prior with reference to relations of the parties [fol. 554] is admissible.

Mr. Legg: Well then, we object to the last answer if that is what he is asking about because it wasn't responsive, and we ask that it be stricken and the Court instruct the jury not to consider it for any purpose.

Q. The question was, Mrs. Garnett,——

Mr. Legg: We have asked for a ruling of the Court, Mr. Smith.

The Court: Overruled.

Mr. Legg: Note our exception.

Q. The question was, Mrs. Garnett, did you see any trouble, if any, between Marvin Clewis and Dorothy Mae Clewis in January, 1962, and what was your answer? Did you see any trouble between Dorothy Mae Clewis and Marvin Clewis in January of 1962?

A. I did.

Q. All right, go ahead and tell the jury what you saw.

A. Well, I was working at Kangaroo Motel. It was on a Sunday about one o'clock. I was called. My granddaughter called me.

Q. A little louder, please.

A. My granddaughter called me and told me to come at once, and I asked her over the phone what was the trouble. She said Marvin had jumped on her mama and he was [fol. 555] threatening her with a gun, and she got scared and she went back over to her house. I says, "Where's E. C.?" and she said, "He's in the house," and she says, "Mama, come right away."

Q. Just what you saw now, please.

A. I am telling you what I saw. O.K.?

Q. All right.

A. I told my boss lady, the housekeeper,——

Mr. Legg: Now, not what she told but what she saw, your Honor. We object to that.

A. I am telling you what I saw, and I got in my car. I had a '57 Mercury at that time. I gets in my car and I goes to the Flat. I stops in the Flat first. Whenever she gets mad she goes down there, and so I questioned around there when I got in there, when I went inside, and nobody hadn't seen her during the day because all of them know her, so it was a colored man who walked up to me—I don't know who he was——

Q. Pardon me, you can't go into anything you heard except——

A. I'm not going by what I heard, I'm going by what I see; I'm going by what the person told me—says, "Miss Rachel, you hurry on to the house," says "Marvin is threatening"——

Mr. Legg: There, again, we must object to——

[fol. 556] The Court: Mr. Smith, question her and get whatever you want out of her and——

A. (Continuing) And when I drove up——

Q. Wait a minute! Wait a minute, Rachel! We are interested in what—O.K., when you drove up to the apartment, you are talking about? O.K.

A. That's right.

Q. O.K., you drove up to the apartment.

A. When I drove up to the apartment, I stopped my car, and I heard them still arguing.

Q. Heard who?

A. Heard them still arguing.

Q. Who do you mean by "them," please?

A. Dorothy, my daughter, and Marvin.

Q. All right.

A. And all at once I heard Marvin say, "Dorothy," he says, "I'm going to kill you." Well, when he said that, I jumped out of my car. They had the door half open, and I jumped out of my car and I opened that door and I was in the house before I knowed it, and I walks up to them and I says, "What's going on here?" He looks at me, and he had the gun in his hand. Just like I says, I don't know which one of his hands, but he still had the gun in one of his hands. I says, "What's going on here?" and my daugh-

[fol. 557] ter says, "Mama, Marvin says he's going to kill me." I says, "No, Marvin ain't going to do nothing to you."

That's the words I said, but I didn't say no more. I stood up there and I looked at her and I looked at him, and she busted out and went to crying. He still had the gun in his hand.

Q. Where was the pointing the gun, Mrs. Garnett?

A. In her face. She says, "Mama, make Marvin put the gun down." I didn't say nothing to him; I looked at him. I didn't crack a smile.

Q. Now, have you observed any other difficulties between Marvin Clewis and Dorothy Mae Clewis?

A. Well, before that we was standing on Lea Street, 105 South Lea, and she came down one evening, somewhere along about five or six o'clock, I disremember, but it was just dark. She come in there crying.

Mr. Legg: Excuse me, Rachel. Your Honor, unless the witness identifies this as to date, we cannot know whether it is objectionable. We do ask that that be done by the questioner.

Q. Was this a few weeks, a few months, a few days, before January, 1962—a few weeks or a few months? About what period of time, Mrs. Garnett?

A. Probably it might have been a little over a year before this happened.

[fol. 558] Q. All right.

Mr. Legg: Then, your Honor, we do object to it as having no material bearing on any material issue in this case, and we object to any testimony along that line.

The Court: Overruled.

Mr. Legg: Note our exception, please, sir, and we will take our Bill later.

Q. Go ahead, Mrs. Garnett, just what you observed, please.

A. And when she come in, I was sitting out on the front porch, me and Sam Foy—that's who I worked, was rooming with at the time. She came in crying. She says, "Mama,"—I says, "Sister, what's the matter?"—I called her "sister"—I says, "What's the matter?" She says, "Mama, Marvin jumped on me." I says, "What'd he jump on you for?" and she said, "I don't know; he jumped on me," and she just boo-hooed. I said, "Well, go in the house and lay down."

She went on in the house and I went on in there with her. So I was talking to her. I says, "Well, he ain't coming in here and bother you," and so I guess——

Q. Just a minute!

Mr. Legg: We object to that as being——

A. ——in about fifteen minutes he walks in.

Q. Excuse me, Mrs. Garnett, wait a minute.

The Court: She is testifying to things out of the presence [fol. 559] of the defendant.

Mr. Smith: I am sorry, sir. I thought both parties were present.

Q. Was Marvin Clewis there then at that time?

A. He came there about ten minutes after she got there.

Q. We are just interested in what was said, Mrs. Garnett, when Marvin Clewis was——

A. —was in the house.

Q. What happened and what was said when Marvin Clewis was there, please.

Mr. Legg: Now, your Honor, we do object to—we do ask that the jury be instructed not to consider any statement made by this witness when this defendant was not present because of the hearsay rule.

Mr. Smith: That is correct. That is absolutely correct.

The Court: Sustained. The jury is so instructed.

Q. Just when Marvin Clewis was present, now, Mrs. Garnett, please.

A. That's right.

Q. Go ahead, please.

A. He asked her to come on and go home. She told him she wasn't going. She says, "I'm not going back to you. You know I told you I didn't wants you." O.K., he kept on a-talk- [fol. 560] ing to her. She got up and she left the house. I says, "Sister, where're you going," and she says, "Mama, I can't stay here." She says, "I'm going down the street here." She went on down in the Flats.

Q. Was Marvin still there?

A. He was still there.

Q. All right.

A. O.K. About ten minutes he went on behind her. When

she came back, he had done knocked a hole up here in her head with a pistol.

Q. All right, did you——

A. And I was the one——

Q. Wait a minute! Wait——

A. —that wiped the blood off.

Q. — a minute, Mrs. Garnett. Wait a minute.

A. All right.

Q. Did you see this or did you not see this yourself?

A. I didn't see him when he hit her, but——

Mr. Legg: All right, your Honor, we ask that any testimony, that her testimony relative to that certainly be stricken from the record and the jury be instructed certainly not to consider it.

Mr. Smith: We agree, your Honor.

The court: All right.

[fol. 561] Q. Did you ever see any difficulty between, any other difficulty between the two of them when you were present and Marvin was present and Dorothy Mae was present, Mrs. Garnett?

A. At Sam King's house I did. I walked up on him.

Q. About when was this?

A. That was the same year they moved up here in these apartments.

Q. That was closer to January of '62 then, wasn't it?

A. That's right.

Q. All right, what happened there, please?

A. Well, they had fought then, and I just got in there in time enough to separate them.

Q. All right.

A. Me and my grandson, L. J. McCrutchen.

Q. All right, was there any other difficulties that you saw between them?

A. Well, I seen so much during other times, him threatening her, with my own eyes—I ain't talking about hearsay —I'm talking about with my own eyes, and I always told him, I says, "Marvin, don't kill her." I says, "You can do anything"——

Mr. Legg: Now, your Honor, we must object to this testimony.

The Court: Sustained.

[fol. 562] Mr. Smith: We have no further questions.

Mr. Legg: And is the jury again structed, your Honor, not to consider the testimony of a general nature that she just made?

The Court: Yes, sir.

* * * * * * *

Cross-examination.

By Mr. Legg:

Q. Now, Rachel, Dorothy Mae was your youngest girl, wasn't she?

A. That's right.

Q. And, of course, you are grieved that she has not been seen since some time in January of 1962.

A. That's right.

Q. And did you and Marvin get along pretty good before January of 1962, or not?

A. So far we did at the time, but I didn't know what had happened, you understand. I fed him three whole months at my house.

Q. After Dorothy Mae disappeared?

A. She had disappeared and I didn't know it.

Q. Well, you knew you hadn't seen her, didn't you?

A. That's right, but I didn't know what had happened to her.

[fol. 563] Q. All right, and, as a matter of fact, you still don't know what happened to her, do you?

A. I know she's gone. I know that.

Q. You know she is still gone.

A. That's right.

Q. Now you say you have heard Marvin threaten her.

A. That's right. Seen it with my own eyes.

Q. Now, Rachel, didn't you think when Dorothy Mae had been gone for a longer time than she had been gone before——

A. That's right.

Q. —that you ought to tell the police about all——

A. I did do it.

Q. —these things?

A. I did do it.

Q. You told them you had seen Marvin threaten her?

A. I did not.

Q. You didn't tell them that they had all these fights?

A. I did not.

Q. Why?

A. Because I told them that my child was missing. That's what I told them. I went to the police station and talked to them. They sent me to the courthouse to the High Sheriff. Told me to go up there, they's the ones to handle the case, and I told them my child was missing.

[fol. 564] Q. When was that?

A. In January.

Q. In January?

A. Shore was.

Q. Do you remember when in January?

A. No, sah, I don't.

Q. Was that before or after your granddaughter, Shirley Jean, had told the police about your mother being missing?

A. That's right.

Q. Was——

A. She told me, you see, she stayed next door to my daughter.

Q. Yes.

A. And she kept me posted, that if there was anything that happened to her or did happen to her, she would call me and tell Marvin to come over here and I'd go.

Q. Well, now, during those three months that you said you fed Marvin——

A. I certainly did.

Q. —he was still looking for Dorothy Mae, wasn't he?

A. He went after her some mornings because I seen him, and along about March, I guess about the middle of March, —he was working in Monahans then—he quit asking me, and then he come to me that something was wrong.

[fol. 565] Q. Well, did you tell the police about that when he came to you in March that there was something wrong?

A. No, I just went to them and told them something had happened to my child. That's what I told them.

Q. When did you do that?

A. Well, I couldn't tell you really what month it was, but

during the time she disappeared, February or March, one, I don't know which.

Q. But after this come to you that something was wrong,——

A. That's right.

Q. —when Marvin, you say, quit asking you about it.

A. That's right. I was still feeding him.

Q. Still feeding him.

A. That's right.

Q. And he quit asking you then.

A. He shore did.

Q. But he had asked you about it nearly every day that he had been there.

A. Before that.

Q. And he had gone to Odessa looking for her, hadn't he?

A. I don't know anything about that.

Q. You don't?

A. I never heard of him going to look for her because she ain't never been in Odessa.

[fol. 566] Q. Ma'am?

A. She done never lived in Odessa. She went there once in awhile with her friend Gus, but for him going over there, I don't know nothing about it.

Q. Where did she run to, Mrs. Garnett?

A. No further than down there in the Flat and back to her house where she could have stayed at.

Q. You said awhile ago that when she got mad she would usually——

A. —go to the Flats, that's right.

Q. Did she get mad pretty often?

A. When he'd make her mad, yes, sir, sure did.

Q. Did Dorothy Mae ever start any fights or anything like that?

A. If she did I don't know anything about it. She didn't bother anybody unless they bothered her. She may tell them something, she never fought 'em or nothing. If she ever did, I never heard nothing about it.

Q. The only fights that you know anything about Marvin was——

A. Marvin and her, that's all.

Q. Was Marvin responsible for those fights?

A. Sure was.

Q. Marvin who?

[fol. 567] A. Marvin Clewis. She couldn't go nowhere where he wouldn't follow her and jump on her.

Mr. Legg: I have no further questions. Thank you, ma'am.

Mr. Smith: No more questions, Mrs. Garnett. Thank you.

(Witness excused)

Mr. Smith: We call Mr. Reed.

Burl Reed, called by the State as a witness, having previously been sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. State your full name, please, sir.

A. Burl Norman Reed.

Q. What is your employment, please, sir?

A. I am polygraph examiner for the Department of Public Safety.

Q. And where are you employed at this time?

A. Dallas.

Q. And where were you employed in July of 1962, please, sir?

A. I was stationed here in Midland.

[fol. 568] Q. What is your experience and training in the Department of Public Safety work, please, sir?

A. Department of Public Safety Polygraph Examiner School, in Austin, at the Department.

Q. All right, sir. Are you married, sir?

A. Yes, sir.

Q. Do you have children?

A. Yes, sir.

Q. How many, please, sir?

A. Three.

Q. You are living in Dallas now with the Department of Public Safety. Is that right, sir?

A. Well, my family still lives in Kilgore.

Q. Have you been working in Kilgore?

A. Yes, sir.

Q. And you were transferred to Dallas?

A. Yes, sir.

Q. I see. All right, Mr. Reed, I call your attention to—do you know Marvin Clewis, the defendant seated over there?

A. Yes, sir.

Q. Were you the polygraph operator here in Midland at the Department of Public Safety in July of 1962?

A. Yes, sir.

[fol. 569] Q. All right, sir. I call your attention to Monday, July 9, 1962, and ask you if you had occasion to be with the defendant, Marvin Clewis.

A. Yes, sir, I did.

Q. Will you tell us, please, if you administered tests to him?

A. Yes, sir, I administered a polygraph examination to him.

Q. All right, we are interested in the length of time of these tests. Were they—can you tell us approximately how long each test lasted?

A. From three and a half to approximately eight minutes.

Q. All right, and how many tests did you give him on Monday?

A. There were four tests.

Q. And between tests were there or were there not rest periods?

A. Yes, sir.

Q. Did you at any time threaten this defendant?

A. No, sir.

Q. Did you strike him?

A. No, sir.

Q. Did you call him bad names?

A. No, sir.

[fol. 570] Q. Would you interrogate him and question him for periods of two and three hours at one time without stopping or resting?

A. No, sir.

Q. Did you tell him that he could not leave until he had given you a confession?

A. No, sir.

Q. Did you tell him that you would give him some milk if he would give a confession?

A. No, sir.

Q. Did any of these things that I am asking you about now happen on Monday; that is, about any abuse, threats, or any of that, happen on Monday, July 9, 1962?

A. No, sir. The only thing I did on Monday was administer a polygraph examination.

Q. All right, sir. You didn't have a long period of interrogation with him on Monday, July 9, 1962?

A. No, sir. About the longest time I talked to him was approximately thirty minutes.

Q. All right, sir. Do you know whether he had anything to eat or drink on that Monday, July 9, 1962?

A. I don't know whether it was that day or not, but I remember him drinking a Coca Cola or possibly some milk, but I don't know particularly which day it was on.

[fol. 571] Q. All right, what about smoking? Did you ever see him smoking any out there?

A. Yes, sir.

Q. What about the 9th, July 9, 1962?

A. Yes, sir.

Q. What about on Tuesday, the 10th? Tuesday, the 10th, did you see the defendant?

A. No, sir.

Q. In no way, shape, form or fashion did you see the defendant on Tuesday?

A. No, sir.

Mr. Legg: Your Honor, we object to this. There is nothing in the record that even indicates that Mr. Reed saw him on Tuesday or Wednesday.

The Court: What is in the record the Court cannot comment upon. Try to stay within the record.

Q. Was the next day you saw him on Thursday?

A. Yes, sir.

Q. July 12th?

A. Yes, sir.

Q. 1962?

A. Yes, sir.

Q. All right, did you threaten him any on that day?

A. No, sir.

[fol. 572] Q. Did you curse him any time on that day?

A. No, sir.

Q. How many tests did you give him on Thursday?

A. I gave him three tests.

Q. I beg your pardon?

A. Three.

Q. Three. What was the length of those tests?

A. I believe about the longest test was approximately ten minutes.

Q. All right, sir. Were there or were there not rest periods in between?

A. Yes, sir.

Q. Did you talk to him other than during the tests?

A. Yes, sir.

Q. What was the length of the longest time you talked to him on Thursday? Except for the tests, what was the longest you talked to him on Thursday, in time?

A. I would say ten or fifteen minutes at the most.

Q. On Thursday did you lift his chin up, say "Look up here, you so-and-so" and lift him up and hit him on Thursday?

A. No, sir.

Q. Or any other time did you strike him?

A. No, sir.

Q. On Thursday or any other time did you hit him in the [fol. 573] stomach with your fist?

A. No, sir.

Q. Did you knock him out of the chair?

A. No, sir.

Q. Did you tell him on Thursday that he couldn't leave unless he confessed?

A. No, sir.

Q. All right, Mr. Reed, now I will ask you, sir, is it correct that you saw the defendant only on Monday, July 9th, and Thursday, July 12th?

A. Yes, sir.

Q. 1962.

A. Yes, sir.

Q. Would you tell this jury, please, if you abused this defendant in any way.

A. No, sir, I did not.

Q. Did you threaten him?

A. No, sir.

Q. Did you strike him?
A. No, sir.
Q. Was there not a cushion in his chair he was sitting in?
A. Yes, sir.

Mr. Smith: Pass the witness.

[fol. 574] Cross examination.

By Mr. Legg:

Q. He remained seated in that chair on Monday from, I believe you said from somewhere around nine o'clock, you thought, that you first talked to this defendant, or earlier,—which was it? Do you remember?
A. I would have to check the record to be sure.
Q. Was it early Monday, or do you know?
A. It seems like it was Monday morning,
Q. Monday morning, and how long was he seated in that room in that chair?
A. At the times I was talking to him and in between the tests and the rest periods, I don't exactly know.
Q. How long were those rest periods?
A. Between each test?
Q. Yes.
A. Oh, sometimes just a few minutes. It will vary on the length of the tests.
Q. How long had he been there all told?
A. I don't recollect the length of time that he was in there.
Q. Two hours?
A. I imagine he was at various times. I don't know.
Q. At various times. You left but he didn't leave, did he?
A. Yes, sir, I left the room.
Q. Did he leave the room?
A. Not that I know of.
Q. Did he remain seated in that chair?
A. I do not know.
Q. And you said you talked to him several times after Monday morning; that is, after you had administered the tests to him. Is that right?
A. I talked to him, yes, sir.
Q. And I believe you said the longest that you probably talked to him on that Monday was thirty minutes.
A. Yes, sir.

Q. Could it have been an hour?,
A. Including the entire tests.
Q. No, no, outside the tests.
A. No, sir.
Q. Thirty minutes is the longest?
A. I would say approximately thirty minutes.
Q. Could have been forty-five, couldn't it?
A. I would say approximately thirty minutes.
Q. You are basing this, of course, on what you remember. That right?
A. On what I remember, yes, sir.
[fol. 576] Q. Now, how many times did you talk to him that Monday afternoon, Mr. Reed?
A. I don't know.
Q. How long have you been with the Department of Public Safety?
A. Twelve years.
Q. In what capacity?
A. As highway patrol and polygraph examiner.
Q. How long were you a highway patrolman?
A. Ten years.
Q. How long have you been a polygraph operator?
A. Two years.
Q. Had you just come to Midland at that time?
A. Yes, sir. I came here on the 1st of June, 1962.
Q. You came here the 1st of June, 1962.
A. Yes, sir.
Q. And is that the first assignment that you had as such an operator?
A. I was working in Austin before I came here.
Q. In polygraph work?
A. In the polygraph school and work.
Q. And how long?
A. Three months.
Q. For the school and work.
[fol. 577] A. Yes, sir.
Q. And then you came to Midland.
A. Yes, sir.
Q. Well, this was, then, your first independent assignment.
A. Yes, sir.
Q. Now prior to that, for ten years, you had been a highway patrolman.

A. Yes, sir.

Q. Mr. Reed, isn't it a fact that you did tell Marvin Clewis that he wasn't going to leave there until he gave a statement?

A. No, sir.

Q. You never did say anything like that?

A. No, sir.

Q. What did you say?

A. I talked to him, I questioned him, and during the examination I talked to him and told him to tell the truth about what had occurred.

Q. To tell the truth about what had occurred. Now, you didn't tell him that for thirty minutes.

A. Well, it was more or less a repetitious type of talk that I was going through.

Q. More or less a repetitious type of talking that you [fol. 578] were going through.

A. Yes, sir.

Q. And that continued into Monday afternoon the same way. Is that right?

A. I didn't talk to him all the time.

Q. No, I know you didn't, but the times you did talk to him——

A. Yes, sir.

Q. —both in that room as an operator and in that room when you were questioning him.

A. Yes, sir.

Q. It was a sort of repetitious type of questioning.

A. Yes, sir.

Q. Mr. Reed, are you telling the jury that you never did strike this defendant?

A. Yes, sir, I am.

Q. Have you ever hit a man while you were working on the highway patrol?

Mr. Smith: If it please the Court, this thing is absolutely improper. He knows better than to ask a question like that. It is clearly improper.

Mr. Legg: All right, I will withdraw the question.

Q. Don't you remember, Mr. Reed, when this defendant told you that afternoon, Monday afternoon, July 9th, just [fol. 579] before he made and signed the statement—and

what time of day was that that statement was made and signed? You know?

A. No, sir.

Q. Now you were there, weren't you?

A. I was there. He has never made a statement to me.

Q. But he told you that he would make a statement, didn't he?

A. No, sir, he didn't tell me that.

Q. He didn't tell you that?

A. No, sir.

Q. He didn't tell you, Mr. Reed, "If you'll just get me some milk, I'll sign any statement that you want me to"?

A. No, sir.

Q. Are you sure?

A. I am positive.

Q. Could that have happened?

A. Not to me.

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[fol. 580] Recross-examination.

By Mr. Legg:

Q. One more question. On Thursday did you talk to this defendant out there?

A. I administered some polygraph examinations to him on Thursday.

Q. And you talked to him outside of that, too, didn't you?

A. Yes, sir.

Q. And how many times?

A. I do not recollect.

Q. Can you make a guess?

A. I would say two or three or maybe four or five times. I don't remember.

Q. For how long a period?

A. Just short periods.

Q. Well, what do you mean by short periods? Thirty minutes?

A. No, sir, I would say around ten or fifteen minutes.

Q. Never longer than ten or fifteen minutes.

A. Well, I would say approximately.

Q. Could have been longer, some of them?

A. Possibly.

[fol. 581] Q. Could have been thirty minutes, some of them?

A. I don't believe so.

Q. You don't believe so.

A. No, sir.

Q. But you don't know.

A. I would call it a shorter time than thirty minutes.

Q. But you don't know how many times.

A. No, sir.

Q. Could have been two, three, four, five times.

A. Could have been.

Q. And is that your best guess about it?

A. That's about my best guess; I mean, I ran lots of people through there.

Q. Mr. Reed, do you remember when Marvin Clewis was out there and you told him that "you're going to make a statement, make it now," on Thursday?

A. I never did tell him that, no, sir.

Q. Well, what did you tell him that Thursday after you had given him the tests?

A. I talked to him about the test and what the test and the chart showed me.

Mr. Smith: Now, your Honor,——

Mr. Legg: He is answering the question, your Honor. He is answering the question.

[fol. 582] Mr. Smith: The witness knows, the State knows, and the Court knows that, unfortunately, tests and the results of them and discussions of them can't be admitted into evidence, and neither can the State, and we ask, therefore, that that particular testimony with reference to tests be excluded.

Mr. Legg: He can talk about the amount of time, your Honor. He is talking to him and he is trying to answer counsel's questions.

The Court: Any reference to tests will be excluded by the Court, and the jury is instructed not to consider the statement about it for any purpose whatever.

Q. Now, did you talk to him about anything else?

A. In reference to what?

Q. Did you tell him that you thought he was guilty?

A. I told him that——

Q. Did you tell him you thought he had killed his wife?

Mr. Smith: Will your Honor instruct counsel to let the witness answer the question before the next question comes?

Q. Just answer yes or no, if you will.

A. Yes, sir.

Q. All right, did you tell him he ought to make a statement?

A. No, sir.

[fol. 583] Q. Now you knew he had already made one statement, didn't you?

A. Yes, sir.

Q. And you talked to him that day——

A. Yes, sir.

Q. —for, you said several times, the longest of which was thirty minutes. That was on Monday.

A. Yes, sir.

Q. And you told him then he ought to make a statement, didn't you?

A. No, sir.

Q. You never did tell him that?

A. No, sir.

Q. You never did tell him on Thursday that he ought to sign one.

A. All I told him was to tell the truth of what occurred.

Q. Well, you had to talk to him all those periods of time to tell him to tell the truth? Did you tell him that each time you talked to him?

A. Yes, sir, several times.

Q. But you never did tell him he ought to make a statement.

A. No, sir.

Q. But he did on both days.

[fol. 584] A. Yes, sir.

Q. You don't remember hitting him that day?

A. No, sir.

Q. Thursday?

A. No, sir.

Q. You don't remember slapping his face?

A. No, sir.

Q. Bringing your hands up like this (demonstrating) and hitting him on the side of the head?

A. No, sir.
Q. Asking him if he was mad?
A. No, sir.
Q. Telling him you wanted him to get mad?
A. No, sir.
Q. You don't remember anything.
A. I didn't do that.
Q. You didn't do it.
A. No, sir.

Mr. Legg: Your witness.
Mr. Smith: We have no further questions.

[fol. 585] GARLAND BLACK, called as a witness by the State, having previously been sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. Please state your name to the Court and jury.
A. Garland Black.
Q. And your place of residence?
A. Midland, Texas.
Q. You are with the Midland Police Department and were in July of 1962?
A. Yes, sir.
Q. Do you know the defendant, Marvin Clewis, seated over here by his counsel, Mr. Legg?
A. Yes, sir.
Q. I call your attention back to July 9, 1962, which was on Monday, and July 10th, Tuesday, and so on. Do you recall when the defendant was in the city jail in Midland at that time?
A. Yes, sir.
Q. What were your hours at that time, hours of duty?
A. From 7:00 A.M. to 3:00 P.M.
Q. Did you have occasion in your duties at that time to see the prisoner from time to time?
[fol. 586] A. Yes, sir.

Q. And do you know whether or not this prisoner had special food or otherwise?

A. Yes, sir.

Q. What?

A. We did serve him milk.

Q. Did you see him get milk yourself?

A. I did, yes, sir.

Q. On what dates did he get special food?

A. I can't recall for sure. One day I served him milk as high as three times.

Q. All right, and he did get special food from time to time. Is that correct?

A. Yes, sir.

Q. I show you what has been marked as State's Exhibit 14 (handing document to the witness) and will ask you if you can identify it, please, sir.

A. Yes, sir.

Q. What is it, Mr. Black?

A. It is a Consent for the officers to search the defendant's panel truck and room in Borger, Texas.

Q. Did you witness the signing of this Consent yourself?

A. Yes, sir.

Q. Did the defendant sign it?

[fol. 587] A. Yes, sir, he did.

Q. Is that your signature down here as a witness?

A. Yes, sir.

Q. What date does the Consent show to have been made?

A. July 11, 1962.

Mr. Smith: The State introduces in evidence the Consent.

Mr. Legg: May I take him on Voir Dire?

Mr. Smith: Go ahead.

Voir dire

By Mr. Legg:

Q. Do you remember when this was signed?

A. The morning of July 11th.

Q. Do you remember where it was signed?

A. It was at the booking desk downstairs at the police station.

Q. You say it doesn't show the date and you don't remember the date?

A. I remember the date on this. I can't remember the date when I served him milk three or four times that day.

Q. Do you remember what day of the week this was?

A. Not offhand, no, sir, I don't.

Q. Could this have been signed another day than July 11th?

A. I wouldn't think so without checking the date.

[fol. 588] A. You didn't type it up?

A. No, sir.

Q. You know who did?

A. No, sir.

Mr. Legg: We have no objections to it.

Mr. Smith: It is offered in evidence.

A copy of the document offered in evidence by the State shows to be an Owner Consent, dated July 11, 1962, signed Marvin Clewis, bearing signatures of two witnesses, giving the officers permission to search his panel truck and room in Borger, Texas, said document being identified as State's Exhibit 14.

Mr. Smith: I have no further questions.

Mr. Legg: No questions.

The Court: With this witness we will recess until nine o'clock in the morning. Gentlemen of the jury, we will finish this case one way or the other either tomorrow or now. Mr. Smith, are you about through?

Mr. Smith: We have some other witnesses we would like to call, your Honor.

The Court: We will recess then until in the morning [fol. 589] at nine o'clock. The jurors will please remember the instructions the Court has given them previously.

5-16-64.
9:00 A.M.

RAY ROBBINS, a witness for the State, having previously been sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. Ray Robbins.
Q. Your employment, please?
A. I am a detective with the Midland Police Department.
Q. How long have you been so employed?
A. Almost five years.
Q. Have you had training for your work?
A. Yes, sir.
Q. Will you tell us, please, what that has been?
A. Well, I have attended all of the schools we have within our department here, and I have had experience as a military policeman in the Military Police school.
Q. All right, sir. Were you on duty in July of 1962?
A. Yes, sir, I was.
[fol. 590] Q. Do you know Marvin Clewis, the defendant in this action?
A. Yes, sir, I do.
Q. Did you have occasion to see him on Sunday, July 8, 1962?
A. Yes, sir, I did.
Q. Do you recall about how long you saw him, or did you talk to him on that Sunday?
A. No, sir, not on Sunday. I did see him for approximately forty-five minutes to an hour.
Q. All right, sir, where was this at, please?
A. This was upstairs in the detective office at the police station.
Q. All right, sir, was he being abused in any way while you were there?
A. No, sir, he wasn't.
Q. Did you try to force a confession out of him, sir?
A. No, sir, I did not.
Q. On that day did you talk to him around midnight?

A. No, sir, I didn't.

Q. Did you talk to him past midnight?

A. No, sir.

Q. Did you talk to him to two or three o'clock in the early morning hours of Monday?

[fol. 591] A. No, sir.

Q. All right, I call your attention to the next day, Monday, July 9th, 1962. Did you have occasion to talk to the defendant?

A. Yes, sir, I did.

Q. Did you see the defendant other than talk to him?

A. Yes, sir.

Q. All right, sir, when did you first see him, if you recall, please, on this Monday?

A. I don't recall the first time I saw him on Monday. I do recall talking with him Monday night.

Q. All right, do you recall he went to get his bond set, and that sort of thing, Monday night?

Mr. Legg: Your Honor, we do object to leading the witness.

Mr. Smith: I am trying to refresh his memory, your Honor.

Mr. Legg: We object to it.

The Court: Get on with the case. Sustain the objection.

Q. When was it you talked to him, Mr. Robbins?

A. Between ten and eleven o'clock, from shortly after ten until about eleven.

Q. All right, and were you trying to force a confession [fol. 592] out of him at that time?

A. No, sir, I was not.

Q. All right, sir, was there anyone with you when you were talking with him?

A. Sgt. Wicker was with me in the beginning; however, he had to leave almost right away after we went upstairs, and I was alone with him after that for, oh, forty-five minutes to an hour.

Q. All right, and after you talked to him, what happened to the defendant?

A. He was put back in his cell.

Q. All right, sir, did you see him around five to six to seven o'clock that afternoon, Monday afternoon?

A. I don't recall Monday.

Q. All right, did you see the defendant any more?

A. Yes, sir, I believe I saw him on the following Thursday.

Q. All right, sir, did you abuse him in any way then?

A. No, sir, I did not.

Q. Did you observe him making a call from the police station on that Thursday?

A. Yes, sir, I did.

Q. About what time of day was this, please?

A. Late afternoon or early evening, oh, between six and [fol. 593] seven or seven thirty, somewhere in there.

Q. Did what he had to say on the telephone have to do with his treatment?

A. Yes, sir.

Q. Would you tell the jury what he said, please?

A. He said substantially that he was being treated all right and that he was being supplied with food that he wanted, cigars, and so forth.

Q. What was his demeanor at that time as to sadness, happiness, sickness, weakness, strongness? How would you describe him while he was on the telephone?

A. He seemed to be perfectly normal to me.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. You deny, Mr. Robbins, that you interrogated this witness but once. Is that right?

A. One time is right, yes, sir.

Q. And you say that was forty-five minutes to an hour.

A. That's right.

Q. And was from ten to eleven o'clock——

A. Yes, sir.

Q. —on Monday night.

A. Yes, sir.

[fol. 594] Q. Now that was after the time that he had made a first statement out at the Public Safety Building, wasn't it?

A. I don't know about the statement.

Q. You don't know anything about the statement.

A. No, sir.

Q. But you are a detective who works down there with Sgt. Morales and Sgt. Wicker and the other members of the detective force.

A. That's right.

Q. But you didn't know anything about when they were taking the statements. Is that your testimony?

A. They had told me they had taken a statement.

Q. That's what I asked you.

Mr. Smith: He answered the question, your Honor. We object to his arguing with the witness.

Q. And that's what I am asking you about on Monday night when you were talking to this witness. You knew he had given the statement out at the Department of Public Safety, didn't you?

A. Yes, sir, I believe I did.

Q. And you know he gave a statement on Thursday, don't you?

A. Yes, sir.

Q. All right, but you say you saw him making a telephone [fol. 595] call Thursday night.

A. That's right.

Q. Who was he talking to?

A. He was talking to Elizabeth Johnson.

Q. How do you know that?

A. Well, that's who he called.

Q. Did you call for him?

A. No, sir, I didn't call but——

Q. As a matter of fact, you really don't know who he was talking to, do you?

A. Well, he addressed her as "Mama Teen" and we know her to be Elizabeth Johnson.

Q. You do?

A. Yes, sir.

Q. And you heard the whole conversation.

A. No, sir.

Q. Who else was there?

A. Sgt. Wicker was there and I believe Sgt. Morales was there, and I am not sure who else.

Q. Where was this?

A. Downstairs at the booking desk.
Q. All you detectives use the same office over there?
A. Yes, sir.
Q. Same office.
[fol. 596] A. Yes, sir.
Q. And you didn't talk to him but that one time on Monday night.
A. That's right.
Q. No other time.
A. That's all.
Q. You think you might have talked to him some Sunday night?
A. Not as such. I am sure we discussed different things while he had company upstairs there. I was in the room upstairs with him with Morales and with some company which he had, some outside company.
Q. You were in the room.
A. Yes, sir, I was there.

Mr. Legg: No further questions.

Redirect examination.

By Mr. Smith:

Q. Who was this outside company he had upstairs, please, if you recall, on this Sunday?
A. There was a Mrs. Garnett and I believe a Mrs. Owens and I think Elizabeth Johnson was there, too.

Mr. Smith: We have no further questions.
Mr. Legg: You may step down, sir.

(Witness excused)

[fol. 597] L. O. WRIGHT, a witness for the State, having previously been duly sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. L. O. Wright.
Q. Your employment?
A. Midland Police Department.
Q. How long have you been with them, please?
A. Six years, four months.
Q. Were you employed in July, 1962?
A. Yes, sir, I was.
Q. I call your attention to the defendant. Do you know him, Marvin Clewis?
A. I know him by sight.
Q. I call your attention back to the month of July, 1962, and ask you, sir, if you had occasion to be on duty at the Midland Police Department on July 10th, Tuesday, July 10, 1962.
A. Yes, sir, I was.
Q. What was your shift at that time?
A. Eleven to seven, night shift.
Q. Night shift? You have had occasion to check the [fol. 598] records on this, I guess, haven't you?
A. Yes, sir.
Q. Now you came on at eleven at night until seven in the morning.
A. Yes, sir.
Q. What were your duties at that time?
A. Desk sergeant.
Q. All right, sir. As desk sergeant, does that mean you have the keys to the jail, and things of that nature?
A. Yes, sir.
Q. Was the defendant in jail at that time?
A. Yes, he was.
Q. Was he taken out of his cell after midnight of Tuesday or early morning hours of Wednesday?
A. Not from eleven to seven while I was on duty.
Q. Was he put into his cell around midnight on?

A. No, sir.

Mr. Smith: We have no further questions.
Mr. Legg: No questions.

[fol. 599] LONNIE R. RICHARDSON, a witness for the State, having previously been duly sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. What is your name, please, sir?
A. Lonnie R. Richardson.
Q. Lonnie R. Richardson.
A. Yes, sir.
Q. What is your employment, please, sir?
A. Sergeant, Police Department.
Q. Were you so employed in July, 1962?
A. Yes, sir.
Q. You know the defendant, Marvin Clewis, seated over here?
A. Yes, sir.
Q. And I call your attention now to Sunday, July 8th, and ask you, sir, if you were on duty—no, excuse, me, I am mistaken. I call your attention to Wednesday and Thursday of July, the—of that July, 1962.
A. Yes, sir, I was.
Q. Did you have occasion to see the defendant at that time?
A. Yes, sir, I did.
[fol. 600] Q. All right, what shift were you working, if you recall?
A. From three P.M. to eleven P.M.
Q. Three P.M. to eleven P.M. All right, sir, did you have occasion to see this defendant? What were your duties?
A. I was desk sergeant.
Q. Does that mean you have the keys and things of that nature?
A. Yes, sir.

Q. Did you have occasion to feed this defendant?
A. Yes, sir.
Q. All right, I ask you, sir, what you fed him on the night of Thursday, July 12th.
A. Tomato soup and soda crackers.
Q. Is that unusual or otherwise for a prisoner to get that type food?
A. It is unusual.
Q. All right. What about on Wednesday? Did you feed him anything?
A. Yes, sir.
Q. What, please, sir?
A. Milk and crackers.
Q. Did you offer him soup and so forth then?
A. Yes, sir, I did.
Q. But he didn't want it. Is that right?
[fol. 601] A. That's right.
Q. Is it unusual or otherwise for a prisoner to have milk and crackers and things of that nature?
A. Yes, it is unusual.
Q. All right, sir.

Mr. Smith: We have no further questions.

Cross-examination.

By Mr. Legg:

Q. That was on Wednesday and Thursday, July 11th and 12th?
A. Yes, sir.

* * * * * * *

LUIS B. SALINAS, a witness for the State, having previously been sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir?
A. Luis B. Salinas.
Q. Mr. Salinas, you are employed by the Midland Police Department, are you not?
A. Yes, sir.
Q. How long have you been employed by them, please sir?
[fol. 602] A. Thirty months.
Q. I beg your pardon?
A. Thirty months.
Q. What year did you first start with them?
A. 1961.
Q. I call your attention to July, 1962, please, sir, and ask you if you were employed then by the Midland Police Department?
A. Yes, sir.
Q. You know the defendant, Marvin Clewis, seated over there?
A. Yes, sir.
Q. Was he in city jail while you were on duty?
A. Yes, sir.
Q. I call your attention to Sunday, July 8th, and ask you, sir, if you recall what your shift was at that time.
A. Eleven to seven.
Q. Have you had occasion to check the records on that?
A. Yes, sir.
Q. And what were your duties on that shift?
A. I was the desk sergeant at that time.
Q. Does that mean you had the keys to the jail?
A. Yes, sir.
Q. All right, sir. I ask you, sir, from midnight on if [fol. 603] if this defendant was taken out of his cell.
A. No, sir.
Q. I ask you, sir, if he was put into his cell from midnight on.

A. No, sir.

Q. He was just there, then. That true?

A. Yes, sir.

Q. All right, we move to the next day. That is Monday. Were you on duty then from eleven P.M. at night to seven, early Tuesday morning?

A. Yes, sir.

Q. All right, sir. I ask you if this defendant was in his cell from midnight on.

A. Yes, sir.

Q. You didn't take him out of his cell from midnight on.

A. No, sir.

Q. You didn't put him back in his cell from midnight on.

A. No, sir.

Q. You had the keys. That right?

A. Yes, sir.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. Did you put him back in his cell after Sgt. Robbins [fol. 604] had completed his questioning of him?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. What time did you come on duty Monday night?

A. Eleven o'clock at night.

A. Eleven o'clock.

A. Yes, sir.

Q. Do you usually get there a little beforehand?

A. Sir?

Q. Do you usually get there a little ahead of time?

A. Sometimes.

Q. Do you remember whether you did that night or what time you went on duty?

A. About quarter to eleven.

Mr. Legg: That's all. Thank you.

Redirect examination.

By Mr. Smith:

Q. Do you log every hour on the hour when you check the jail, sir?

A. Approximately, yes, sir.

Q. And you make a note of this?

A. Yes, sir.

Q. And put it in the records. Right?

[fol. 605] A. Yes, sir.

Mr. Smith: Thank you. That is all.

Herman Wicker, a witness for the State, having previously been duly sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

Q. Your name is Herman Wicker?

A. Yes, sir.

Q. Employment?

A. Police Department, City of Midland.

Q. You are a detective with the Police Department?

A. Yes, I am.

Q. How long have you been with the Midland Police Department?

A. Since November of 1960.

Q. All right, sir, and do you know the defendant, Marvin Clewis, seated over here?

A. Yes, sir.

Q. Were you on duty, sir, in July of 1962?

A. Yes, sir, I was.

Q. I call your attention to Sunday, July 8, 1962. Do you recall what shift you were working on at that time?

[fol. 606] A. I was working from three in the afternoon to eleven P.M.

Q. Did you have occasion to see the defendant, Marvin Clewis, on that Sunday afternoon?

A. Yes, sir, I did.

Q. Would you tell the jury where you saw him, please?

A. I saw him upstairs in the detective office between three thirty and four o'clock.

Q. Did you have occasion to see them bring him food in there?

A. Not then, no, sir.

Q. Did he have visitors up there at that time?

A. Yes, sir, he did.

Q. Was he abused in any way?

A. No, sir.

Q. Did you interrogate him at that time?

A. No, sir.

Q. Did you try to force him to sign a confession of any sort?

A. No, sir, I did not.

Q. Did you interrogate him late the night, Sunday night?

A. No, sir.

Q. Did you interrogate on past midnight Sunday night?

A. No, sir.

[fol. 607] Q. For the sake of the record now, back in July of 1962 did you smoke a pipe?

A. Yes, I did.

Q. Would I be accurate, sir, in assuming you are what is termed a big man who smoked a pipe?

A. Yes, sir, I smoked a pipe.

Q. Now, sir, I ask you about Monday, July 9th, and ask you, sir, if you had occasion to see the defendant.

A. Yes, I did.

Q. All right, sir, where was that?

A. That same place, upstairs in the detective office.

Q. All right, sir, about what time was this that you saw him?

A. Between 7:30 and 8:00 o'clock.

Q. Were you interrogating him at that time?

A. No, sir.

Q. Were you trying to get a confession out of him?

A. No, sir.

Q. Were you trying to force a confession out of him?

A. No, sir.

Q. Did you abuse him in any way?

A. No, sir.

Q. Do you recall whether or not he had any food at that time?

[fol. 608] A. Yes, sir, he did.

Q. Tell the jury, please, what you recall about the food.

A. Well, the trusty brought in some warm soup, and he had a quart of sweet milk on the desk in front of him. He was sitting in the back office in the northeast corner of the building, sitting at a desk, and he ate some soup and drank some milk.

Q. Do you recall saying anything to him about "Do you want a doctor?" or anything of that nature?

A. Yes, sir, I was sitting in the front office and he was sitting in the back, and I was sitting where I could see him through the door, and I noticed he began to act like he was wanting to vomit or acted kind of like he was sick and I asked him was he all right, and he said well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, "Do you want a doctor?" and he said "no."

Q. All right, sir. Were you with him any more on Monday besides that approximate half hour you mentioned?

[fol. 609] A. No, sir.

Q. Did you interrogate him later that night?

A. No, sir, I did not.

Q. Did you interrogate him on past midnight?

A. No, sir.

Q. Did you try to force a confession out of him past midnight?

A. No, sir.

Q. Did you threaten or abuse this defendant in any way?

A. No, sir.

Q. All right, we move to Tuesday, sir, the next day, which would be the 10th. Did you interrogate this defendant on that day?

A. No, sir, I didn't see him.

Q. You didn't see him on Tuesday.

A. No, sir, I did not.

Q. Did you see him on Thursday?
A. Not on Thursday, no, sir.

Mr. Smith: We have no further questions of this witness.

Cross-examination.

By Mr. Legg:

Q. You never did ask him any questions about this, Herman?
[fol. 610] A. Yes, sir, I asked him some questions about it. It was on a Wednesday night.
Q. Wednesday night?
A. Yes, sir.
Q. That was the first time you ever talked to him?
A. As far as interrogation, yes, sir.
Q. Sir?
A. As far as interrogation, yes, sir. I talked to him while he was sitting up there eating, but not in reference to the case.
Q. How long was that on Wednesday night?
A. Oh, about twenty or thirty minutes.
Q. And this time you say he ate was on Monday night?
A. Yes, sir, that was Monday night.
Q. Did you see him eat any other time?
A. No, sir.
Q. You know whether he ate any other time or not?
A. From personal knowledge, no, sir.

Mr. Legg: That is all.
Mr. Smith: We have no further questions.

[fols. 611-612] WAYNE MERRITT, called as a witness by the State, after first being duly sworn, testified upon the merits of the case as follows:

Direct examination.

By Mr. Smith:

* * * * * * *

[fol. 613] Q. All right, sir, did you observe the defendant being interrogated that morning?

A. I did.

Q. Was anybody trying to force a confession out of him?

A. No, sir.

Q. Was anybody threatening him in any way?

A. No, sir, there was not.

Q. Was anybody abusing him in any way?

A. No, sir.

Q. Did you see him have anything to eat or drink that day?

[fol. 614] A. I am not sure I recall him eating or drinking anything. He was offered some things. Possibly that afternoon he was offered some milk and did drink that.

Q. You recall anything about a Coca Cola that day?

A. Not right offhand, I don't know.

Q. What about smoking? You know if he was smoking or not?

A. He was allowed to smoke, yes, sir, if he wanted to.

Q. Did you see him when he was resting any or was he constantly being talked to, if you recall?

A. No, sir, there were quite a few intervals during the day that he was just sitting in a room by himself.

Q. Did you hear anybody swear at him or curse him?

A. No, sir.

Q. All right, Monday afternoon. Were you also in and out observing the interviewing of this defendant?

A. I was, yes, sir.

Q. Was anybody trying to force a confession out of him Monday afternoon?

A. No, sir.

Q. Was anybody abusing him or cursing him in any way Monday afternoon?

A. No, sir.

Q. Were people free to come and go back there Monday [fol. 615] afternoon?

A. Yes, sir, it was the same as it was Monday morning.

Q. Did you see the defendant any more after Monday?

A. I did, yes, sir.

Q. When, please, sir?

A. On the following Wednesday I accompanied John Wood and Jesse Morales and the defendant to Borger.

Q. All right, sir.

A. And again on Thursday I saw him.

Q. That was Wednesday, July 11th, you went to Borger?

A. Yes, sir.

Q. All right, sir, you went up there and looked at a panel truck. Is that right?

A. Yes, sir, we went up there for the purpose of searching this vehicle to try to find any additional evidence that might help us.

Q. All right, sir. While you were in Borger, did the defendant have visitors or did he not visit with people up there at Borger?

A. While we were at the truck, it was there where he had been staying, I assume. There were some of his friends or guys he had been working with there. One of them, I believe, came over and talked to him for a short period of time while we were there.

[fol. 616] Q. Did you hear anybody abuse the defendant on the way to Borger?

A. No, sir.

Q. Curse him?

A. No, sir.

Q. On the way back from Borger did you hear anybody abuse him or curse him?

A. I don't believe we even talked to him.

Q. Did anybody draw back at him as if to hit him either going or coming to Borger?

A. No, sir, he wasn't abused in any way.

Q. Was he abused while you were there in Borger?

A. No, sir.

Q. Did you hear anybody curse him in Borger?

A. No, sir.

Q. Do you recall whether or not he was offered any food in Borger?

A. Yes, sir, he was offered food.

Q. O.K., we move to Thursday now. Did you see him at the Department of Public Safety in the polygraph offices back there on Thursday?

A. I did, yes, sir.

Q. Were you in and out somewhat like you were on Monday?

A. I was in and out but not near as much. I had some [fol. 617] work in the lab I was doing, but at different intervals I was going in and out of the room, though.

Q. Did you see him abused in any way?

A. No, sir.

Q. Anybody curse him?

A. No.

Q. Anybody try to force a confession out of him?

A. No.

Q. Anybody hit him?

A. No.

Mr. Smith: We have no further questions.

Cross-examination.

By Mr. Legg:

Q. Of course, you can't tell this jury whether anybody abused this defendant or threatened him or cursed him or anything of that nature, can you, Mr. Merritt, on Thursday, except during such times as you happened to be present?

A. That's right. He was not abused or threatened or anything during the time I was there.

Q. During the time you were there.

Q. On Monday I will say I was probably in and out of the observation room approximately eighty per cent of the day, but on Thursday, again it was, oh, about half of the time at the most.

[fol. 618] Q. Now you say you went to Borger on Wednesday?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir. It was on the 11th.

Q. You didn't go on Thursday?

A. No.

Q. How long was this defendant out there on Monday?

A. Oh, I would say approximately from around 9:00 or 9:30 in the morning to maybe 5:00 in the afternoon. I left around 4:15 that afternoon, I believe.

Q. So you don't know whether he was there until 5:00, 6:00, 7:00, or when.

A. No, I don't.

Q. How long was he there Thursday?

A. Oh, best I can recall, about the same length of time on that.

Q. You didn't even talk to him on the way to Borger.

A. Oh, I might have said—who, me?

Q. Well, anybody. I believe you said you didn't believe "we" talked.

A. Oh, on the way back, I said we weren't talking. I think he was talked to from the time we left Midland until about the time we got to Lubbock, and then after that nothing was said pertaining to the case that I can recall, except [fol. 619] when we got to Borger he directed us where the vehicle was supposed to have been, possibly where the men were working. It wasn't there and we went to where it was. The sheriff's office had found it for us.

Q. You were sitting in the front seat of the car going and coming?

A. Yes, sir.

Q. Who was in the back seat?

A. Detective Morales and the defendant.

Q. And, of course, you don't know what all their conversation might have been either going or coming.

A. Well, I was listening to what was taking place both going and coming.

Q. You were?

A. Yes, sir.

Q. Of course, you say people are free to go and come in this observation room but, as a matter of fact, about all the people who ever go in that observation room out there are officers, aren't they, of one kind or the other?

A. The officers, yes, sir, are the ones who are bringing

people in to have polygraph tests, are the only ones going in and out of there.

Q. How long had you been here, Mr. Merritt, on July 9th as a chemist out there?

[fol. 620] A. Well, I had moved out—on July 9th?

Q. Yes.

A. I had been there exactly a year.

Q. Exactly a year.

A. Yes, sir.

Q. How long had Mr. Reed been there?

A. I believe he started to work in Austin on January of 1962.

Q. I am talking about out here.

A. Well, he came out in April, I believe.

Q. Well, if he said it was June 1st, why, you wouldn't quibble with that.

A. No. I don't recall exactly the date. I would have to go back and check on some records to see when he did come out exactly, but it was the first part of 1962 when he came out.

Q. Is this the first time that you had watched him conduct any of these tests out there or anything like that?

A. No, sir, it was not. I have watched him on many occasions.

Q. Now you have watched him on many occasions.

A. Yes, sir.

Q. But at that time, of course, he had not been here very long and you had not seen him.

[fol. 621] A. No, but prior to that time I had had the chance to see him many times.

Mr. Legg: That is all.

Mr. Smith: We have no further questions.

JESUS MORALES, called as a State's witness and having previously been sworn as a witness for the State on the Hearing of Motion of the Defendant outside the presence of the jury, now testifies under oath for Plaintiff in the hearing of the case on its merits before the jury, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.
A. Jesus Morales.
Q. Your employment, sir?
A. Detective Sergeant for the Midland Police Department.
Q. How long have you been with the Midland Police Department?
A. Little over six years, sir.
Q. And were you employed, sir, in July, 1962?
A. I was.
Q. Are you married, Officer Morales?
A. Yes, sir.
[fol. 622] Q. You have children?
A. Yes, sir.
Q. Where do you live?
A. 3801 Thomason.
Q. You know the defendant, Marvin Clewis, seated there?
A. Yes, sir.
Q. I ask you if you had occasion to see him on Sunday, July 8, 1962.
A. Yes, sir.
Q. Did you try to force a confession out of him on that date, sir?
A. No, sir.
Q. Did you talk to him for long extended periods of time?
A. I did not.
Q. What was the longest you talked to him at any one time on that Sunday, please, sir?
A. Oh, about an hour or hour and a half.
Q. And then would someone else come in and talk to him, or was he allowed to rest?
A. He was allowed to rest.
Q. Did you talk to him on Sunday afternoon?

A. Yes, sir.

Q. Will you tell us whether or not he had any visitors on that Sunday afternoon.

[fol. 623] A. He did.

Q. Will you tell us, sir, whether or not he had a chance to visit with them alone.

A. He did.

Q. Do you recall who the visitors were?

A. Yes, sir.

Q. Who?

A. Annie May Owens, his sister; Elizabeth Johnson, his girl friend; and his mother-in-law, Mrs. Rachel Garnett.

Q. All right, sir. Did you abuse the defendant in any way on Sunday?

A. I did not.

Q. Did you threaten him in any way?

A. No, sir.

Q. Did you curse him?

A. No, sir.

Q. Did you strike him?

A. No, sir.

Q. Did you draw back as if to strike him on that Sunday?

A. No, sir.

Q. Was he offered any food on Sunday?

A. Yes, sir.

Q. What, please?

A. In the morning he was given some rolls, sweet rolls, [fol. 624] and coffee, and in the afternoon he was offered the regular jail supper.

Q. All right, sir. This was in your presence.

A. That is correct.

Q. About what time was it the last time you talked to him on Sunday?

A. Must have been between 4:30 and 5:00.

Q. Did you talk to him that night, Sunday night?

A. No, sir.

Q. Didn't see him any more Sunday?

A. No, sir.

Q. Did you abuse or threaten him or interrogate him for a long period of time Sunday night or past midnight?

A. No, sir.

Q. All right, sir. I call your attention to Monday, July 9th. Did you see the defendant on that day?

A. I did.

Q. Did you see him out at the Department of Public Safety, DPS, out there?

A. Yes, sir.

Q. Did you have occasion to talk to him out there?

A. I did.

Q. What was the longest time you ever talked to him out there?

[fol. 625] A. Oh, in the afternoon we were talking there, and we must have talked about forty-five minutes to an hour right at the last.

Q. Did you talk to him for shorter periods of time during the day?

A. Yes, sir.

Q. After you would talk to him, would other officers talk to him?

A. Well, Monday, the first time I talked to him for any length of time was in the afternoon, but I did talk to him two or three times to ask him if he wanted to use the bathroom or if he wanted anything to drink.

Q. What about around lunch time? Was he or not offered any food?

A. Yes, sir.

Q. You know whether or not he had anything to drink around noon or any other time?

A. He had a Coca Cola around noon.

Q. All right, what about in the afternoon? Did he have anything to eat or drink?

A. He had some milk in the afternoon.

Q. Now then, after you would talk to him, before another officer would talk to him, was he allowed to rest or not?

A. Yes, sir.

[fol. 626] Q. All right, did you curse him or call him bad names on Monday out there?

A. I did not.

Q. Did you threaten to hit him out there?

A. No, sir.

Q. Did you tell him he wouldn't be allowed to leave unless he gave you a confession?

A. No, sir.

Q. What about smokes? Did he have any smokes out there?

A. Yes, sir, he took some cigars that were left for him that morning by Elizabeth Johnson.

Q. Did he request a lawyer?

A. No, sir.

Q. This was out in the offices of the polygraph operating area, the DPS. Is that correct?

A. That is correct.

Q. Were people allowed to come and go out there while this was going on?

A. Yes, sir.

Q. Is there a two-way glass that people can look in and see what is going in?

A. Yes, sir.

Q. You didn't strike him aside the head, or did you strike him up aside the head out there, sir?

[fol. 627] A. Never touched the man.

Q. All right. About what time did he leave the Department of Public Safety on that Monday?

A. Monday? It must have been between 6:00 and 7:00.

Q. P.M.?

A. P.M.

Q. All right, where was he taken?

A. Sgt. Gideon and I brought him to the police station.

Q. On the way to the police station did you make any stops?

A. Yes, sir.

Q. Tell the jury, please.

A. We stopped at a grocery store that is located on North Big Spring and bought him some soup and crackers.

Q. All right, sir, Monday night at the police station, were you with the defendant there some?

A. Yes, sir.

Q. Did he have any visitors that night?

A. He did.

Q. Who?

A. Elizabeth Johnson.

Q. About what time was this, please?

A. It must have been around 9:00 o'clock.

Q. What was the last time or last hour by the clock that

[fol. 628] you saw him on Monday?

A. It was around that time, about 9:00 or a little after 9:00.

Q. Did you interrogate him any after that?

A. No, sir.

Q. Did any other officer, to your knowledge, interrogate him after that?

A. No, sir.

Q. You did not interrogate him past midnight?

A. No, sir.

Q. At any time on this Monday, sir, did you prolong and extend your questioning or interrogation of this man?

A. No, sir.

Q. Did you ever try to force a confession out of him?

A. No, sir.

Q. All right, sir. Tuesday, the next day, July 10th. Did you see the defendant any on Tuesday?

A. No, sir.

Q. You didn't interrogate him at all?

A. No, sir.

Q. You didn't abuse him or threaten him or touch him in any way on Tuesday?

A. No, sir, I was off that day.

Q. All right, sir. Wednesday. Did you see him on [fol. 629] Wednesday?

A. Yes, sir.

Q. What happened on Wednesday? Did you take him to Borger?

A. Yes, sir.

Q. Did he have breakfast before he left Midland?

A. He said he wasn't hungry.

Q. He was offered breakfast?

A. Yes, sir.

Q. Did he sign a permit to search the truck before he left Midland?

A. Yes, sir.

Q. I show you what has been marked State's Exhibit 14 and ask you if you can identify it. Is that a permit?

A. Yes, sir.

Q. All right, on the way to Borger did you threaten him?

A. No, sir.

Q. Curse him?

A. No, sir.

Q. Draw back as if to hit him?
A. No, sir.
Q. Did you abuse him in any way on the way up there?
A. I did not.
Q. Was he allowed to smoke or otherwise?
[fol. 630] A. Yes, sir.
Q. After you got to Borger did you abuse him?
A. No, sir.
Q. Was he allowed to have visitors while he was up there in Borger?
A. Yes, sir. When we were searching the panel truck, he had some—I think it was his brother-in-law, he said it was his brother-in-law—he talked to him and they brought him some water there. He sat down on the running board of the panel, or right next to the panel, which I found out later that one of them was his brother-in-law. I think his name was Owens.
Q. He visited there with his brother-in-law.
A. That is correct.
Q. Brought him some water.
A. Yes.
Q. Was he offered any food or not in Borger?
A. Yes, sir.
Q. Was any purchased for him?
A. No, he said he wanted milk. That is all he wanted.
Q. Did he have any milk?
A. I got him some milk.
Q. All right, was he abused on the way back to Midland?
A. No, sir.
[fol. 631] Q. Was he cursed?
A. No, sir.
Q. Threatened?
A. He was not.
Q. When you arrived in Midland, where did you take him?
A. Took him to the police station.
Q. All right, and about what time did you get to Midland, roughly, approximately?
A. Oh, it must have been around 7:00 o'clock in the evening.
Q. Did you interrogate him any more that night?
A. No, sir.

Q. Did any other officer to your knowledge?

A. No, sir.

Q. What about food Wednesday night? Was he offered any?

A. I told the man in charge there at the desk to feed him.

Q. Thursday. Did you see him on Thursday? Thursday, the 12th.

A. Yes, sir.

Q. Out at the DPS?

A. Yes, sir.

Q. Did you question him out there?

A. For a short time in the afternoon.

[fol. 632] Q. All right, sir, you didn't question him any that morning?

A. I did not.

Q. What was the longest period at one time or the longest period you talked to him for questioning?

A. Questioning him? Oh, about twenty minutes.

Q. All right, was he allowed to rest after each questioning session?

A. Yes, sir.

Q. Did you threaten him in any way out there on Thursday?

A. I did not.

Q. Did you curse him?

A. No, sir.

Q. Did you hit him?

A. No, sir.

Q. Were you trying to force a confession out of him out there?

A. No, sir.

Q. Did you say to him, "You can't leave until we get what we want?

A. No, sir.

Q. Did you push him out there on that day?

A. I did not.

[fol. 633] Q. Were people allowed to go and come in the interrogation area while all this was going on Thursday out there?

A. Yes, sir.

Q. Two-way glass out there, I guess.

A. That's correct.

Q. All right, sir, I call your attention to Thursday morning. You know Mr. H. S. Harris?

A. Yes, sir.

Q. Would you tell the jury, please, whether or not this defendant had a visitor Thursday morning.

A. He did.

Q. Was it Mr. Harris?

A. Well, I went upstairs at the police department and noticed Mr. Harris talking to Mr. Clewis over here in one of the cells, and I went over to where Mr. Harris was and asked him if he wanted to use one of our offices, which is also located upstairs. He said he would be glad to, so I directed him back into the office, our detective office—we have three rooms back there—and he went into the furthest office in there, and I asked him if he wanted any coffee and he said he did. I asked Marvin if he wanted something, so I brought two cups of coffee in there, and Mr. Clewis over here said he didn't want any coffee and I asked him if he wanted some milk and he said yes, so I went back—we had [fol. 634] some milk for him in the ice box there in the kitchen—and I brought a cup and a quart of milk to him, and when I left Mr. Harris was talking to him.

Q. Is Mr. Harris an attorney here in town?

A. Yes, sir, he is.

Q. This was Thursday morning?

A. Yes, sir.

Q. July 12, 1962.

A. That is correct.

Q. Now back to the DPS Thursday afternoon. You know whether or not the defendant made a written statement out there on Thursday afternoon?

A. Yes, sir.

Q. Was this after he had talked to Mr. Harris or before?

A. After he talked to Mr. Harris.

Q. Was he forced or coerced in any way to make that statement out there at the DPS?

A. No, sir.

Q. After the defendant was brought to the county jail at the county courthouse, did you ever see him while he was over here?

A. No, sir.

Q. Never did talk to him.

A. No, sir.

[fol. 635] Q. About what time, if you recall, did he leave the DPS on Thursday night, the defendant?

A. Must have been around six.

Q. Did you transport him back to the city jail?

A. Yes, sir, I did. I and Major Taylor.

Q. One last question, Mr. Morales. Did you ever abuse this defendant in any way whatsoever?

A. No, sir.

* * * * * * *

Cross-examination.

By Mr. Legg:

Q. When did you take this defendant into custody, Morales?

A. Sunday morning.

Q. Where?

A. When did I put him in jail?

Q. No, where did you take him in custody?

A. I talked to him the first time Sunday between six and seven at Elizabeth Johnson's residence here in Midland.

Q. If you told me here yesterday or night before last, or whenever it was, that you took him at 6:00 o'clock in the morning, why, then that would be about right, wouldn't it?

A. Between 6:00 and 7:00.

Q. Do you remember I asked you why you went there at 6:00 o'clock in the morning and you said you go to work at 6:00?

[fol. 636] A. I said that I go to work—when we are working on something, we don't have any certain hours, Mr. Legg. We sometimes work maybe eight, fifteen, twenty hours. It all depends.

Q. You don't remember the question. Why did you pick him up at 6:00 o'clock? You said, "I go to work at 6:00."

A. I went to work at 6:00 that day.

Q. Did you have a warrant for his arrest?

A. No, sir.

Q. You knew, of course, that the body or remains of the body had been found northwest of town, didn't you?

A. Yes, sir.

Q. That was outside the city limits, wasn't it?

A. That is correct.

Q. And that is outside your jurisdiction as a police officer, isn't it?

A. Outside the city limits it is.

Q. Did the Sheriff's office ask you to help them on this case?

A. No, sir.

Q. You knew the Sheriff's office was working on it, didn't you?

A. Sir, to answer that question I would have to tell you how we got into the investigation.

[fol. 637] Q. Did you know that the sheriff's office was working on the case, or didn't you?

A. Yes, sir.

Q. How did you know Marvin Clewis was there?

A. Where?

Q. Where you went to get him that Sunday morning at 6:00 o'clock.

A. Because I knew he was supposed to be back in town either Saturday night or Sunday morning.

Q. You did?

A. Yes, sir.

Q. When did you find that out?

A. I found that out, it must have been, Friday or Saturday.

Q. You told him to come on and go with you to the police station. ~~Is that~~ right?

A. I asked him to, sir.

Q. You asked him.

A. Yes, sir.

Q. Was he asleep when you got there?

A. No, sir. He was in bed.

Q. You don't know whether he was asleep or not, do you?

A. No, sir, that's correct.

Q. And then you took him down here to the police station [fol. 638] just a few minutes later. Is that right?

A. Yes, sir.

Q. And then, according to you, when you got down there you gave him some rolls and coffee?

A. Yes, sir.

Q. Did he eat them?

A. He ate the rolls, but the coffee, I don't know whether he drank it all. He drank a little bit. It was put there before him.

Q. But you say he ate the rolls.

A. Yes, sir.

Q. Then you talked to him for awhile?

A. Yes, sir.

Q. And did somebody else talk to him?

A. No, sir.

Q. Nobody else talked to him?

A. No, sir, not when I was talking to him at that time.

Q. What?

A. Just me.

Q. While you were talking to him. After you got through with him, who talked to him?

A. Nobody, not that I know of, unless—we have a general check-up there every hour on the hour, and it is very possible the sergeant in charge might have talked to him. [fol. 639] He talked to all the prisoners up there. He checks them. That is his duty, and it is possible he might have said something to him, I don't know.

Q. When did you talk to him again then? You said you talked to him an hour or hour and a half?

A. That's correct. Right before I left him, I asked him if he needed anything and he said, "Yeah," he needed some cigars, so I told him I would be back, I was going to check his story out, and so I went on, and I must have come back around 11:00 o'clock and gave him his cigars, and then I talked ——

Q. Did you buy him some cigars?

A. Yes, sir.

Q. Did you talk to him about 11:00 o'clock?

A. Oh, I talked to him a few minutes when I gave him the cigars.

Q. What did you tell him you were putting him in jail for, or did you?

A. Yes, sir. I was investigating a missing person; in fact, we had two missing persons reports that we were investigating, and that was one of the reasons he was picked up to talk to about, because his wife had been missing, reported missing to the police department back in January of '62.

Q. And, of course, you had those missing persons reports.
[fol. 640] A. Yes, sir. We got another woman missing, too, that was also checked out.

Q. You had another woman missing at the same time?

A. Well, no, we had one missing prior to that, but we have had two outstanding.

Q. And are they still outstanding?

A. One of them is.

Q. It was about 11:00 o'clock, you say, when you talked to him a few minutes?

A. Yes, sir.

Q. How long?

A. It must have been ten or fifteen minutes. No more than that.

Q. When did you talk to him again?

A. It was that afternoon. I was still checking on his story and it must have been about 1:30 or 2:00 o'clock, somewhere in there.

Q. And how long did you talk to him that time?

A. Oh, I must have talked to him on and off for about two hours, but in between there he had these people come visit him.

Q. If you told me three hours on Sunday afternoon the other night, you wouldn't question that now, would you?

A. No, sir.

[fol. 641] Q. It could have been three hours?

A. Yes, sir. It must have been between 4:30 and 5:00 when I left him that afternoon.

Q. I believe you told me you left the police station about 5:30 that afternoon.

A. Well, I mean talking to him. I might have done something else down there.

Q. Now, was he given any lunch down there that time?

A. Lunch? No, sir.

Q. Was he given any dinner there that night?

A. Supper?

Q. Supper.

A. He was—a plate was brought to him.

Q. A plate was brought to him?

A. Yes, sir.

Q. When?

A. Oh, it must have been between 4:30 and 5:00.

Q. Is that the usual feeding time?

A. Yes, sir.

Q. Were you there?

A. Yes, sir.

Q. The plate was brought to him. Did he eat it?

A. I don't think he ate it. He said he wasn't hungry, if my memory serves me correctly.

[fol. 642] Q. Did you offer to give him anything else?

A. Yes, we asked him. He said he wanted some soup.

Q. What were you trying to get him to do?

A. What was I trying to get——?

Q. What were you trying to get him to do that Sunday?

A. What is the question?

Q. You talked to him for about six hours, according to your testimony. What were you trying to get him to do?

A. We were just checking out his story, as far as his wife was concerned; we had a report of her missing. The body that was found out here wasn't identified. We were just doing police work.

Q. You were doing police work.

A. That is correct.

Q. Now, what were you trying to get him to do?

A. To sign a polygraph waiver—is that what you are getting at, Mr. Legg?

Q. If that is what you were trying to do, yes. Is that what you were trying to do?

A. Was I trying to get him to sign one?

Q. Yes.

A. Yes, sir.

Q. All right, and you say he had some visitors down there.

[fol. 643] A. Yes, sir.

Q. And you talked to those visitors before they talked to him, didn't you?

A. Did I talk to them before they talked to Clewis?

Q. Yes.

A. Yes, sir.

Q. And you were there when they talked to Clewis, weren't you?

A. Yes, sir.

Q. And you told them that they ought to tell him to sign that polygraph waiver, didn't you?

A. No, sir, not in those words.

Q. That it would help him.

A. The man said he did not know nothing about his wife, where she was, and the only thing the polygraph waiver was typed out for was disappearance of Dorothy Clewis, so he said he didn't know nothing about her, he didn't know where she was. We asked him to sign a polygraph and he said he didn't trust me; he wanted somebody he could trust and wanted his sister or his girl friend or his mother-in-law; they were gotten up there; they happened to be downstairs, and he said he trusted them, so he wanted to talk to them to see if that was the right thing to do. He talked to them; he signed a polygraph waiver.

[fol. 644] Q. You didn't talk to him Sunday night?

A. No, sir.

Q. What time did you see him Monday morning?

A. Oh, around 7:00.

Q. And what was that for?

A. Oh, we took him out for a ride, out in the country.

Q. Took him for a ride in the country?

A. That's a farm-to-market road. I don't know the number of it.

Q. 868?

A. 868.

Q. And where did you take him?

A. We went out there for, oh, right off this Big Spring or this Lemesa Highway. We went about three or four miles.

Q. You say "we." Who is that?

A. Sgt. Kuykendall and Mr. Clewis.

Q. And you?

A. That's right.

Q. And how long did you stay out there?

A. Oh, the trip from the station to where we went and back was probably twenty-five minutes.

Q. Twenty-five minutes.

A. That is correct.

Q. Where did you go after that?

[fol. 645] A. After where?

Q. After you went out there.

A. Came back to the police station.

Q. Where did you go after that?

A. Well, after awhile we went to the Department of Public Safety.

Q. Where is that?

A. On North Big Spring.

Q. About what time did you go out there?

A. Oh, anywhere between—it must have been a little after 8:00, maybe 8:30.

Q. And Marvin Clewis stayed out there the rest of the day, didn't he?

A. Yes, sir.

Q. And you talked to him several times out there, didn't you?

A. Yes, sir.

Q. And Mr. Wood, Texas Ranger, talked to him several times that day, didn't he?

A. Yes, sir.

Q. And Mr. Reed, the polygraph operator, talked to him several times that afternoon when you all were questioning him, didn't he?

A. Mr. Reed talked to him in the afternoon.

[fol. 646] Q. Did you get a confession?

A. We got a statement.

Q. All right, what time of day did you get it?

A. Well, he started telling me about it around 2:30.

Q. What time of day did you get the statement is what I asked you.

A. In the afternoon.

Q. Afternoon?

A. Yes, sir.

Q. You don't know what time?

A. 2:30 and, between 2:30 and maybe 3:00.

Q. Well, if you said up here the other night it was signed around 5:00 o'clock or 5:30, why, then, that would be all right, too, wouldn't it?

A. Yes, sir, but he gave two. He made me change one.

Q. Made you change one.

A. That is correct.

Q. Now, he made you do that.

A. Well, he told me that wasn't right, certain words. Once he gave it to me, I wrote it down in longhand and got it typed. I read it back to him and he said, "Well, I don't like this two words here; let's change them."

Q. How many times did you talk to him that day?

A. Oh, I talked to him about two or three times.

[fol. 647] Q. How long?

A. Well, like I said, I talked to him. There were two or three times I talked to him if he wanted to use the restroom, if he wanted something to drink, wanted something to eat.

Q. Now, I'm not talking about that. How many times did you talk to him when you were questioning him?

A. One time.

Q. Just one time.

A. Yes, sir.

Q. How long was that?

A. Well, when he started telling me that, it was between —well, we stayed there from I think it was 2:30 up until about 5:30, because, as I said, I took it in longhand, the first statement, and then we got it typed and brought it back to him, and we read it and he said something—there was something about he didn't drink, or something.

Q. When were Mr. Reed and Mr. Wood talking to him?

A. They must have talked to him some time before I talked to him.

Q. Well, you were there.

A. Oh, yes, sir. They talked to him before I did.

Q. And they talked to him for quite some period of time?

A. Well, they talked about ten or fifteen minutes and let him rest.

[fol. 648] Q. They talked to him some after 2:30, didn't they?

A. Yes, they talked to him when he was signing the——

Q. When you weren't.

A. No, sir. I was with him until he signed the statement.

Q. You were in there.

A. Yes, sir.

Q. All right.

A. You see, we were getting it typed. I wasn't talking to him while we were getting it typed.

Q. You were with him until you got the statement. Now, wasn't that the purpose of all that that day, getting him to sign a confession?

A. No, sir, the purpose of that was to get the facts.

Q. The purpose was to get the facts.
A. That is correct, the truth out of him.
Q. Did you tell him he ought to sign a statement?
A. I didn't tell him to do anything, sir.
Q. You didn't tell him to do anything. And you didn't tell him, Morales, that he wasn't going to leave there until you got what you wanted and until he signed that statement?
A. No, sir.
Q. And you didn't hit him up side the head?
A. No, sir.
Q. Are you sure?
[fol. 649] A. I am positive.
Q. You didn't curse him and call him names?
A. No, sir.
Q. You never did do that?
A. No, sir.
Q. Not at any time that you recall?
A. No, sir.
Q. Did you say you went to Borger Wednesday?
A. Sir?
Q. You went to Borger Wednesday?
A. Yes, sir.
Q. Let me ask you this: Did this defendant, Marvin Clewis, have anything to eat after you say he ate the roll on Sunday morning until Monday night or late Monday afternoon when he signed that statement?
A. Besides the coke and milk, he didn't want anything else.
Q. Besides the coke and milk.
A. Quart of milk.
Q. Did you hear him say, "If you'll just bring me some milk, I'll sign anything you want me to"?
A. No, sir.
Q. Did you tell the newspaper reporter that put that statement in the paper that he had said that up there that day?
[fol. 650] A. No, sir.
Q. All right. Now you say you didn't talk to him Monday night?
A. Monday night, no, sir.
Q. You had taken him back down to the station.

A. Yes, sir.

Q. Did you feed him there?

A. We left word for him to be fed. We brought him the crackers and soup Monday, and we told the man in charge at the desk, which is something we don't usually do to make arrangements for things like that, but due to the fact the man couldn't eat anything else, we told him we wanted him fed the soup.

Q. Is that the only time you brought him any crackers and soup?

A. Yes, sir. I think there was some—his girl friend brought him some.

Q. You are sure it wasn't on Thursday that maybe you might have stopped by and brought him some crackers and soup?

A. No, sir, I know the date, because I paid for it out of my own money and never did get it back.

Q. It couldn't have been on Thursday?

A. No, sir.

Q. Now, of course, when he left the DPS building on [fol. 651]. Monday, why, you brought him back to the station.

A. That is correct.

Q. And later you took him to the courthouse. That right?

A. Yes, sir.

Q. Who did you take him to over here?

A. It was one of the justices of the peace. I don't remember who it was.

Q. All right, and was that the first time since you had arrested him at 6:00 o'clock Sunday morning that you took him before a magistrate?

A. That is correct.

Q. Now, of course, you have been a detective for a while here, haven't you? You attended some schools.

A. Yes, sir.

Q. And you know that as a detective that the law requires you to take a man forthwith before a magistrate when you arrest him, don't you?

Mr. Smith: If the Court please, that is an incorrect statement, and we object to it.

Mr. Legg: This is cross examination.
The Court: Go ahead.

Q. Answer the question.

A. In our investigative work, we do not make it a practice that every time we pick a man up that we take him [fol. 652] directly to a magistrate. If we investigate our work and if a man's story is not what it is, we do some more investigative work until we are sure before we file any charges, Mr. Legg.

Q. And you hold him in custody and question him and give him tests and you take him out to the scene of a crime that you say you are not even holding him for.

A. The test that he took, he signed a waiver and it was voluntary, sir. When he was taken to the police station, it was voluntary, too.

Q. And you take a statement from a man then two days later, after the passage of two full days, when according to your own testimony you know that the man had not had anything at all to eat since, according to your testimony, from 6:30 Monday morning. Is that right?

Mr. Smith: Your Honor, we object to the argumentative form of the question.

Mr. Legg: Your Honor, I believe this is cross examination.

The Court: Get on with the case.

Q. Is that right?

A. He was offered every opportunity to have things to eat. We could not force him to eat if he did not want to, sir.

Q. Do you think, Sgt. Morales, that a man who hasn't had anything to eat for two full days is capable of signing a [fol. 653] confession when he is in the hands of you and other police officers down there?

A. Is he capable?

Q. Is he capable of rationally signing voluntarily a confession to anything?

A. If he knows that he is telling the truth he is.

Q. You have taken lots of them that way, haven't you?

A. Sir?

Q. You have taken lots of them under circumstances like that, haven't you?

A. If a man tells me the truth and he wants to do it voluntary, I take a statement, yes.

Q. And he wanted to do that then.

A. Yes, sir. He signed it.

Q. You didn't talk to him that Monday night.

A. No, sir.

Q. Not Tuesday?

A. No, sir, I was off that day.

Q. Didn't talk to him at all, did you?

A. No, sir.

Q. You didn't tell me the other night that you were off that day.

A. Well, ——

Q. You didn't bother him on Tuesday. Were you off?

[fol. 654] A. Yes, sir.

Q. And you say it was on Wednesday you took him to Borger.

A. That is correct.

Q. Couldn't have been Thursday.

A. No, sir.

Q. And you saw here and identified a Consent you have here, didn't you?

A. Yes, sir.

Q. Did you question him on the way to Borger?

A. We talked off and on. He had a little Bible he was reading, a little Testament that was brought to him by one of his friends. We were talking all the way up there.

Q. All right, what about on the way back?

A. We were talking to him and smoking. I was sitting back with him in the back.

Q. Did you question him?

A. A little bit. Mostly, we were just talking; just carrying on a kind of conversation.

Q. You had this Consent, didn't you?

A. Yes, sir.

Q. You saw that.

A. Yes, sir.

Q. And you say this was given before you ever went to Borger?

[fol. 655] A. Yes, sir.

Q. What did you take him with you for?

A. For one thing, he didn't know where the panel truck

was going to be. He said it might have been in Oklahoma because they were fixing to change jobs, so he said we needed him so he could show us where the work site was over there. In fact, before we got into Borger, he took us to the work site where he figured they might be working and the panel truck be there, and then, when we didn't find it there, we went up there and stopped and picked up some officers, some Borger officers, which is customary, and then he showed us where his people were living and then he showed us where his panel truck was.

Q. The officers did?

A. Mr. Clewis did.

Q. Of course, you had talked to the officers up there about locating the truck, hadn't you?

A. I didn't. Mr. Wood might have. I didn't.

Q. And the officers knew where the truck was and told you. You knew that they had advised you that they had located the truck, didn't you?

A. I don't recall, but Mr. Clewis pointed it out when we were going on a side street. He said——

Q. That was the only reason——

[fol. 656] Mr. Smith: Let him answer the question, your Honor.

Q. Go ahead. I thought you were through.

A. Well, when we were going by this street here, they were in about half a block from the alley there, next to some rural houses that he pointed to and said, "There's the panel truck." He told us how to turn there and drive in where these houses were, and we went over there and parked.

Q. And that's the only reason you took him with you, so that he could point out the truck to you.

A. That's right. We didn't know what truck we were going to look for.

Q. You didn't?

A. I never had seen it before, Mr. Legg.

Q. Of course, you knew who he worked for, didn't you?

A. Not until he told me, but I don't even know what that company does or what it is. I am not familiar with him. I never had no occasion to go into that kind of work.

Q. You know how far it is to Borger?

A. No, sir.

Q. How long did it take you all to get up there?

A. Oh, we got up there around noon.

Q. You didn't question him; you just sat back there and talked and visited.

A. Yes, sir. I might have asked him a question once in [fol. 657] a while when we ran out of conversation.

Q. Then you came on back to Midland.

A. Yes, sir.

Q. You talk to him that night?

A. No, sir.

Q. You don't know whether anybody else did or not.

A. No, sir.

Q. All right, what about Thursday, according to the way you have the chronology of events? What happened Thursday?

A. Well, the first time I saw him that day was when he was talking to Mr. Harris.

Q. What time was that?

A. Oh, it must have been around 7:30 or 7:45, somewhere close to that.

Q. It couldn't have been Friday he talked to Harris, could it?

A. No, sir.

Q. Did Harris tell you whether or not he was representing him?

A. No, sir. He was in the cell talking to him, and we got an office up there he could use. You can use it any time.

Q. Did Harris tell you he was representing him?

A. No, sir, I don't believe I asked him.

Q. You didn't ask him. You never did hear from him any [fol. 658] more, did you?

A. No, it's not my business to go call him and see what he is going to do. If he was going to take him as a client—I mean, we don't interfere with you attorneys.

Q. Now, don't you think, Sgt. Morales, thinking about it, looking back on it, it probably was Friday, because after a lawyer had been down there that's the day you brought him over here to the county where he was supposed to have gone when he was taken before that magistrate?

A. No, sir. It was Thursday morning.

Q. Wasn't he supposed, according to the warrant that the justice of the peace issued, to be remanded to the custody of the sheriff of this county on Monday night?

A. Sir, we have—it does that, but we have, I am pretty sure, an understanding between the two departments that, until we finish our investigative work, we do not usually bring them over unless the bond is set and he is ready to be released. That is done in a lot of cases.

Q. Even though the warrant that is given to you says you are supposed to take him to the sheriff and he is in his custody from then on?

A. When we get a warrant, the sheriff's department is notified that the man is in custody and where he is at, and in the event he wants him, if he says, "Don't take him," we [fol. 659] will leave him here; if he does not, we will take—when we finish getting all our facts, he is brought over here. Any time he is wanted, he is brought here.

Q. Did you take him to the sheriff's office that night?

A. The warrant was taken to them and they were told where it was, and they have a record of it.

Q. He was not taken up there.

A. Not to the sheriff's office.

Q. You took him back to the police station?

A. That is correct.

Q. Where did you take him on Thursday?

A. To the Department of Public Safety.

Q. What time?

A. Oh, in the morning. It must have been around 8:30 or 9:00.

Q. And what happened out there? Did you question him out there?

A. Not that morning.

Q. Did you question him that afternoon?

A. Yes, sir, it must have been after 2:30. It must have been around 3:00. We left him there for a period of time; we had to go do some other things.

Q. And how long did he stay out there that day?

A. Until about 6:00 o'clock.

[fol. 660] Q. And that's when he signed the second statement that you took. That right?

A. That's correct.

Q. Now what did you do to him to get him to sign that statement?

A. I didn't do anything.

Q. You didn't? How many times did you talk to him?

A. I didn't talk to him that morning, and I came by about noon and I gave him some cigars, one of my cigars. He said he wanted one. Well, we got permission from him to go search a car, and we left him there. About these cigars, that is all he asked for. He asked for one and we gave it to him.

Q. You say you didn't talk to him out there that Thursday. Is that right?

A. Oh, yes, I talked to him. I didn't talk to him Thursday morning.

Q. You didn't talk to him——

A. I mean, I watched him when they had him in the polygraph room. I didn't question him, interrogate him.

Q. You did Thursday afternoon?

A. Yes, sir.

Q. And how many times did you say?

A. Well, he was left there for about two or three hours. [fol. 661] There wasn't anybody talking to him; he was resting. That was when we were out there searching the car.

Q. During the time that you were gone then, was that when Mr. Reed was talking to him?

A. No, sir, we all left. There were about four of us that went out.

Q. You left him out there in whose custody?

A. They have a little room there that is locked from the outside.

Q. You locked him up?

A. That's right. He's got a chair.

Q. You left him there.

A. Yes, sir.

Q. Any water in that room?

A. No, sir.

Q. Rest-room facilities?

A. No, sir; right across the hall.

Q. He was locked up in the room. What else was in the room?

A. There was just a chair. I think he's got an ash tray in there.

Q. You left him there for two or three hours.

A. Yes, sir.

Q. What time was that? When was that?

[fol. 662] A. That was Thursday.

Q. What time?

A. Must have been around noon.

Q. You left him there for two or three hours by himself.

A. No, we left him about noon and came back about 1:00 o'clock, but you asked me when I talked to him, and I'm trying to tell you the times that we had left him alone and didn't bother to talk to him or bother him to question him in any way.

Q. When was this time that you left him there for two or three hours?

A. We left him there at noon and then we came back about 1:00. This was when I asked him if he needed anything, and he said he wanted to go to the bathroom and I gave him a cigar, and we talked to him about getting a permit to search his car and he signed it and we left him there.

Q. You went to eat lunch then at noon?

A. Yes, sir.

Q. Did you bring him back any lunch?

A. No, he didn't want any.

Q. He didn't want any.

A. No, sir. He said he wanted some cigars.

Q. Did you bring him back any milk?

A. Oh, no, pretty sure I didn't.

[fol. 663] Q. Now, of course, according to your testimony, he had never refused milk, had he?

A. No. I asked him if he wanted anything, and he said no, he wasn't hungry.

Q. Wasn't hungry. And so you think then that really is the only time you left him by himself.

A. No, when we went up to search the car.

Q. That was another time?

A. Well, that was just after I talked to him about 1:00 o'clock.

Q. That is you and Ranger, John Wood, and this other

fellow, Reed. Did you all eat together, eat lunch, and go search his car and all?

A. Yes, sir.

Q. Who else was out there?

A. I think Mr. Wayne Merritt was out there.

Q. Was he with you all day Thursday in this interrogation?

A. Well, he's got his office right next to the polygraph room. He would come in and out of there. He is a chemist.

Q. Well, he was there all day and was witnessing this and working with you on Thursday. That right?

A. He was in and out of the office.

Q. And the same thing on Monday? Merritt?

[fol. 664] A. He was in and out.

Q. About the same amount of time both days?

A. He would come in and look in and walk out. His office is as near as from here to that railing there.

Q. Did he ever question him?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. Who did question him?

A. When?

Q. Besides you, Thursday.

A. Thursday?

Q. Yes.

A. Mr. Reed talked to him.

Q. What time?

A. Oh, he talked to him in the morning several times.

Q. How many times in the afternoon?

A. Oh, he might have talked to him once.

Q. If he said, one, two, three, four, five times, why, you wouldn't argue with that, would you?

A. Well, I don't think he talked to him that many times in the afternoon.

Q. Now he would know more about that than you would, wouldn't he?

[fol. 665] A. Well, it is possible.

Q. Now, I believe you testified that all day Sunday you didn't say anything to him about murder.

A. No, sir.

Q. Did you tell him anything about the grave out there?

A. No, sir.

Q. Did you tell him you thought that was Dorothy Mae?

A. No, sir.

Q. Didn't tell him anything.

A. No, sir.

Q. But Monday morning bright and early the first place you took him was out there to that grave.

A. Yes, sir.

Q. And what did he say there?

A. We still didn't talk about no murder.

Q. Beg your pardon?

A. We still didn't talk about any murder or anything like that.

Q. Well, I know, but while you were out there that morning, did you say something to him? Did you ask him if he knew what that was?

A. Yes, sir.

Q. And what did he say?

A. He said, "I guess this is where she was buried."

[fol. 666] Q. He said, "I guess that is where she's buried."

A. That's correct.

Q. But you all had never talked about that.

A. No, sir.

Q. How about Monday? When did you first say anything to him about it? About what time of day was it when you first said anything to him about the fact you thought he killed his wife?

A. He had been around the polygraph for questioning about the disappearance of his wife, Dorothy Mae Clewis,—

Q. I asked you about what time it was.

A. Well, that's what I am trying to ——

Q. Will you just tell me what time it was?

A. Well, I can't put a time in there, but, just like I say, Mr. Reed talked to him. He was running a test on that particular thing.

Q. And you talked to him, Mr. Morales.

A. Well, I asked him if he knew where his wife was and then I asked him could that be his wife.

Q. Well, do you remember when you first told him that he ought to make a statement on Monday?

A. Oh, it must have been in the afternoon.

Q. Now when did you tell him on Thursday that he ought to make a different statement?

[fol. 667] A. I didn't tell him he ought to. I just told him if he wanted to get the whole truth down, tell us about it.

Q. When was that?

A. Well, you were talking about Thursday.

Q. Thursday, now. I mean what time?

A. Oh, that was—it must have been around 3:00 or 3:30, something like that.

Q. Isn't it a fact, Morales, that you went into that room with him and you told him that "I'm getting tired of fooling around with you, I'm getting impatient with you, and you're going to give us a statement, you are going to tell us about it; tell us now"?

A. No, sir.

Q. And that you went up to him and got down on his face ——

Mr. Smith: Let's not badger the witness, your Honor.

Q. —and pushed him, or something of that nature?

A. No, sir.

Mr. Smith: Your Honor, ——

Mr. Legg: I am asking him if he did something.

Mr. Smith: I am objecting, your Honor, to counsel badgering the witness.

The Court: Let's get on with the case.

Q. You didn't do that?

[fol. 668] A. No, sir.

Q. You never do that.

A. No, sir, I don't.

Q. And you didn't question him Sunday night, Monday night, or Tuesday.

A. No, sir.

Q. You treated him like a king, didn't you?

A. I treated him like a human being.

Q. You did?

A. Yes, sir.

Q. Where is that statement that you took Monday?

A. I believe it is in the district attorney's files.

Q. Where is the statement that you took Thursday?

A. I believe they have that, too.

Q. So you want this jury to believe and to find that you never did threaten him, abuse him, coerce him, persuade him, in any way to sign either of those two statements that you got from him.

A. That is correct.

Mr. Legg: That is all.

Mr. Smith: We have no questions.

[fol. 669] WAYNE TAYLOR, a witness for the State, after first being duly sworn, testified upon the merits of the case, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.

A. Wayne Taylor.

Q. What is your employment, please, Mr. Taylor?

A. Assistant chief, Midland Police Department.

Q. How long have you been with the Midland Police Department?

A. Since September 6, 1959.

Q. All right. Do you know Marvin Clewis, the defendant, seated here?

A. Yes, sir, I do.

Q. Were you assistant chief in July, 1962?

A. Yes, sir, I was.

Q. I call your attention to the week period designated as Sunday, the 8th, through Friday, the 13th of July, 1962, and now I ask you, sir, if you had occasion to see the defendant out at the Department of Public Safety on Thursday, July 12th, 1962.

A. Yes, sir, I did.

Q. Did you have occasion to bring him from the Depart-
[fol. 670] ment of Public Safety back to the city police station?

A. Yes, sir.

Q. That would be about what time Thursday, please?

A. It was getting late in the evening, after 5:00 o'clock sometime. I don't remember the time.

Q. Did you observe the defendant any at the Department of Public Safety Thursday afternoon?

A. Yes, sir.

Q. Was he abused in any way?

A. No, sir.

Q. Threatened in any way?

A. No, sir.

Q. And did the defendant make any comment to you about his feelings, about his treatment?

A. Yes, sir, he did.

Q. Will you tell the jury what he said, please?

A. I asked him if he had been mistreated in any way and he said he hadn't, that he had been treated real well ever since he had been handled by the officers.

Q. And about what time did he tell you this?

A. On the way from the DPS back to the police department.

Q. Some time after 5:00 o'clock.

A. After 5:00.

Mr. Smith: Pass the witness.

[fol. 671] Cross-examination

By Mr. Legg:

Wayne, of course he knew that you were the assistant chief down there, didn't he, or at least he knew you were an officer?

A. I feel sure he did.

Q. You weren't out there very long that day, were you?

A. Not too long at a time I was not out there, but I was in and out several times.

Q. And, of course, Morales was in charge of the investigation out there.

A. Yes, sir, he was.

Q. Why did you feel it necessary to ask him if he had been mistreated?

A. We ask all of them that and, besides, there had been some word got back to us that had been put out that he said he had been mistreated.

Q. And this was on Thursday.
A. That was on Thursday.

* * * * * * * *

[fol. 672] VICTOR KUYKENDALL, called as a State's witness and having previously been sworn as a witness for the State on the Hearing of Motion of the Defendant outside the presence of the jury, now testifies under oath for the State in the hearing of the case on its merits before the jury, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.
A. Victor Kuykendall.
Q. Your employment, please, sir?
A. Midland Police Department.
Q. How long have you been with the Midland Police Department?
A. Eleven years.
Q. I beg your pardon?
A. Eleven years.
Q. And are you a detective there with them now?
A. Yes, sir.
Q. Were you a detective in July of 1962?
A. Yes, sir.
Q. You know the defendant, Marvin Clewis, the defendant seated here?
A. Yes, sir.
[fol. 673] Q. Did you see him in July of 1962?
A. I did.
Q. Did you have occasion to see him on Sunday, July 8th, 1962?
A. No, sir.
Q. You didn't talk to him and didn't see him?
A. No, sir.
Q. What about Monday, July 9, 1962? Did you see him that day?

A. Yes, sir.

Q. Did you see him out at the Department of Public Safety?

A. Yes, sir.

Q. Did you interrogate him out there?

A. No, sir.

Q. What part of the day did you observe him?

A. Almost all day.

Q. Was he in the polygraph offices there?

A. Yes, sir.

Q. Most of the time? Were you in and out observing him?

A. Yes, sir.

Q. Through that two-way glass thing?

A. Yes, sir.

Q. Can you hear what is going on inside there?

[fol. 674] A. Pretty clearly, yes, sir.

Q. All right, and you can see all right.

A. Yes, sir.

Q. Were other people going and coming from time to time——

A. A few, yes, sir.

Q. —observing him?

A. Yes, sir, a few.

Q. At any time Monday did you observe any abuse to this defendant?

A. No, sir.

Q. Hear anybody curse him?

A. No, sir.

Q. Hear anybody threaten him?

A. No, sir.

Q. Hear anybody trying to force a confession out of him?

A. No, sir.

Q. See anybody strike him?

A. No, sir.

Q. Or draw back as if to strike him?

A. No, sir.

Q. Did you see him have anything to eat or drink that day, Monday?

A. Yes, sir.

Q. When, please, sir, and what?

[fol. 675] A. I believe he had a coke about noontime and later on in the afternoon he had some milk.

Q. Who purchased the milk?

A. I did.

Q. Did you see him any on Tuesday?

A. Yes, sir.

Q. Where at, please, sir?

A. At the police station.

Q. And how many times did you see him on Tuesday at the police station?

A. I believe I talked to him twice.

Q. And what was the longest period of time that you talked to him?

A. Fifteen or twenty minutes.

Q. Any other officers talk to him that day, to your knowledge?

A. Not that I know of.

Q. Did Cope Routh, a newspaper reporter, talk to him?

A. Yes, sir.

Q. In your presence?

A. Yes, sir.

Q. How long did Mr. Routh talk to him?

A. Probably around fifteen minutes.

Q. Any time you saw this defendant, was he ever abused [fol. 676] in any way on any date you saw him?

A. No, sir.

Mr. Smith: We have no further questions.

Cross-examination.

By Mr. Legg:

Victor, were you the officer who told Cope Routh, the newspaper man, that Marvin had said that "If you'll just bring me some milk, I'll sign any kind of statement you want me to"?

A. I couldn't hear all you said.

Q. Were you the officer who told the newspaper man, Cope Routh, that Marvin had said, "If you'll just bring me some milk, I'll sign any kind of statement you want me to"?

A. No, sir.

Q. At whose instructions did you get the milk?

A. It was during a break, and Sgt. Morales asked me if I would go get some milk.

Q. And you did.

A. Yes, sir.

Q. And brought it back.

A. Yes, sir.

Q. There was some time elapsed before the milk was given to Marvin Clewis, wasn't there?

A. It probably took me ten minutes to go get the milk [fol. 677] and bring it back.

Q. I mean after you got back.

A. I gave it directly to Morales, and he gave it to Marvin.

Q. Now Morales, of course, says he was in the room with him during most of that time. You were not in the room with him, were you?

A. No, sir.

Q. And you were not out there all day, I don't suppose, were you?

A. Yes, sir, I was there all day.

Q. During all of the time that you were there, were you watching the interrogation which was going on, and so forth?

A. No, sir, not all the time.

Q. Just part of the time.

A. I was just in and out.

Q. So, of course, your testimony is only as to such portions as you yourself witnessed. You don't know what happened when you weren't there or anything about it, do you?

A. No, I don't.

Q. When you got back with that milk, why, Marvin Clewis and Morales were talking in there?

A. I believe so.

Q. And Morales was in the process of taking the statement from him?

[fol. 678] A. No, sir, not at that time, I don't think so.

Q. You don't know what time that was?

A. Somewhere around 4:30.

Q. Around 4:30 when you brought the milk.

A. It was close to that.

Mr. Legg: Thank you.
Mr. Smith: No further questions.

WAYNE GIDEON, having previously been sworn and testified as a witness for the State in the Hearing of Defendant's Motion to Exclude and Suppress Confessions out of the presence of the jury, is now called by the State to testify in the hearing of the case on its merits before the jury, and testifies under oath, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please.
A. Wayne Gideon.
Q. What is your employment, please?
A. Detective with the Midland Police Department.
Q. How long have you been with them, Mr. Gideon?
A. Eight years.
Q. Were you a detective in July of 1962?
[fol. 679] A. I was.
Q. You know Marvin Clewis, the defendant?
A. I do, sir.
Q. Did you have occasion to see him on Sunday, July 8, 1962?
A. No, sir.
Q. You weren't around him at all that day?
A. No, sir.
Q. Now, for the sake of the record, Mr. Gideon, and not for the purposes of embarrassment, is it true that you have a knot, small knot, on the side of your head? Is that true, sir?
A. Yes, sir.
Q. You are a tall man. Is that right?
A. Yes, sir.
Q. And it is your testimony you did not see or talk to this defendant on Sunday. Is that right, sir?
A. That is correct.
Q. July 8, 1962. Did you see him on Monday, sir?
A. Yes, I did.

Q. Did you see him out at the Department of Public Safety, the DPS?

A. Yes, I did.

Q. Did you see him while he was being talked to out there?

[fol. 680] A. Yes, sir.

Q. Were you in and out of the polygraph office out there?

A. Yes, sir.

Q. At any time did you see him abused in any way, out there?

A. No, sir.

Q. Cursed?

A. No, sir.

Q. Hit?

A. No, sir.

Q. Threatened?

A. No, sir.

Q. Anybody trying to force a confession out of him?

A. No, sir.

Q. Did Marvin Clewis make any remarks to you concerning his treatment out there that day?

A. Yes, he did.

Q. Would you tell the jury what he said?

A. Said he was doing just fine, getting along good.

A. Was he talking to you?

A. Yes, sir.

Q. You know if he had anything to eat or drink out there that day?

A. Yes, he did.

[fol. 681] Q. Tell the jury, please.

A. I know that he had cokes and milk.

Q. All right, what about smokes?

A. Yes, cigars.

Q. You saw him—was this both morning and afternoon out at the Department of Public Safety?

A. Yes.

Q. Your testimony goes to both morning and afternoon. No abuse of any kind. That right, sir?

A. That's correct.

Q. Now did you bring him from the Department of Public Safety back to the city police department?

A. Yes, sir, I did.

Q. And approximately what time?

A. 5:00 in the afternoon.

Q. Did you make a stop on the way back to the city police department?

A. We did, sir.

Q. Tell the jury, please, about that.

A. Mr. Clewis explained that he had an ulcerated stomach and that jail food didn't agree with him, and he asked for some soup. We stopped at a small drive-in grocery on North Big Spring Street and bought him some soup and some crackers on the way back.

[fol. 682] Q. Did you talk to the defendant any that night, Monday night?

A. No, sir.

Q. Didn't see him any that night. That right?

A. No, sir.

Q. Did you see him any Monday night?

A. No, not Monday night.

Q. Now, we move to Tuesday, July 10th. Did you see the defendant on Tuesday?

A. No.

Q. Did you talk to the defendant on Tuesday?

A. No.

Q. What about Wednesday?

A. No, sir.

Q. All right, sir, on Thursday did you see him?

A. Yes, sir.

Q. See him out at the DPS again?

A. Yes, sir.

Q. Was it morning, afternoon, or both, or do you recall?

A. Yes, sir, I was in and out all day.

Q. Did you see any abuse of any kind to this defendant out there that day?

A. No, sir.

Q. Were you with him in his presence late that Thursday [fol. 683] afternoon?

A. I was, sir.

Q. Did he make any comments about his condition at that time to you?

A. Yes, he did.

Q. Will you tell the jury what he said?

A. Yes, sir. He said, "I feel like I can eat something now. I have that knot out of my stomach. I got it all straight with the Lord."

Mr. Legg: Your Honor, we do object to those statements as being certainly statements made in custody and not admissible in this case for any purpose even were they true.

The Court: Overruled.

Mr. Legg: That's an extrajudicial statement.

Q. Were you present when he signed a statement out there on Thursday, sir?

A. I was.

Q. Was this after or before he signed that statement you are talking about? He made these remarks you just got through talking about. Did he make those before he signed the statement or after, or do you know?

A. I don't recall, Mr. Smith.

Mr. Smith: We pass the witness.

[fol. 684] Cross-examination.

By Mr. Legg:

Q. Wayne Taylor, was he head of the detectives at that time?

A. No.

Q. Who was?

A. Capt. Roger Robbins.

Q. That's not the Robbins that testified here, is it?

A. No, sir, that is Ray Robbins.

Q. And Capt. Robbins was on vacation during this time, wasn't he?

A. That's correct, sir.

Q. And you were then taking his place as detective captain.

A. Yes, sir.

Q. As detective captain, you had to stay around the station a little closer during that period than you would otherwise, didn't you, Wayne?

A. That's correct, sir.

Q. Now, you say you didn't see him at all on Sunday?

A. That's correct.

Q. You were there, weren't you?

A. At the police department?

Q. Yes.

[fol. 685] A. No, sir, I was not.

Q. You weren't there at all?

A. All day Sunday, no, sir.

Q. Were you there Monday?

A. Monday? Yes, sir.

Q. You were going out to the DPS between your regular duties down here. Is that right?

A. That's correct.

Q. You weren't out there all day, is what I am trying to say, or anything like that.

A. No, I wasn't.

Q. Do you know how many times you went out there, or anything like that? Would you guess? Did you spend as much as, oh, half the day out there?

A. No.

Q. So you don't know, of course, anything that happened while you weren't present out there, do you, sir?

A. No, sir.

Q. Do you know anything about when he had the milk that you mentioned? Did you see that?

A. Yes, sir.

Q. Do you know what time of the day that was?

A. Yes, sir, I think it was the middle of the afternoon or so. I had gone back out to the Department of Public [fol. 686] Safety and Sgt. Victor Kuykendall was there and I was talking on the phone, and he came around and asked if he could borrow my car, that Marvin had asked for some milk and he wanted to go get him some milk.

Q. Now, if he said that it was 4:30 or thereabouts when he went after that milk, why, you wouldn't argue with that, would you?

A. I just don't recall.

Q. You just don't remember what time it was. Was Sgt. Morales in there talking to him at that time?

A. No, Sgt. Morales was with me at the time. Someone may have been talking to him, but I don't know who it might have been.

Q. Had they begun to take a statement from him at that time?

A. No.

Q. That was later?

A. Later that day. He made a statement prior, on Monday, but——

Q. Excuse me, I was talking about Monday. Was it on Thursday that Sgt. Kuykendall wanted to go get the milk or was it on Monday?

A. No, it was on Monday.

Q. It was on Monday, and do you know whether he had [fol. 687] made a statement or in the process of making any statement when Sgt. Kuykendall came to you? If you don't know, that's all right. I don't mean to——

A. I don't recall; I just don't remember.

Q. All right. Thank you very much, Wayne.

Mr. Legg: That is all.

Mr. Smith: That is all.

JOHN WOOD, having previously been sworn and testified as a witness for the State in the Hearing of Defendant's Motion to Exclude and Suppress, out of the presence of the jury, is now called by the State to testify in the hearing of the case on its merits before the jury, and testifies under oath, as follows:

Direct examination.

By Mr. Smith:

Q. State your name, please, sir.

A. John Wood.

Q. What is your employment, please, Mr. Wood?

A. Department of Public Safety, Texas Rangers.

Q. I beg your pardon, I wasn't listening.

A. I am with the Department of Public Safety, Texas Rangers.

Q. How long have you been a Ranger, Mr. Wood?

[fol. 688] A. About fifteen years.

Q. How long have you been in law enforcement?

A. About twenty-two years.

The Court: How many more witnesses have you?

Mr. Smith: I will ask Mr. Mashburn. He is keeping a list of them. I am not keeping up with them. We may have one more, your Honor.

Mr. Legg: I will have two in rebuttal.

The Court: Proceed.

Q. Mr. Wood, I will ask you if you know the defendant, Marvin Clewis.

A. Yes, sir, I do.

Q. Were you a Ranger back in July, 1962?

A. Yes, sir, I was.

Q. Did you see the defendant, Marvin Clewis, in July, 1962?

A. Yes, sir, I did.

Q. Mr. Wood, I call your attention to Monday, July 9, 1962, and I ask you if you had occasion to see the defendant at the Department of Public Safety here in Midland.

A. I will have to refresh my memory from my notes that were made at the time of the investigation.

Q. All right, go ahead, please.

A. Yes, sir, I did.

[fol. 689] Q. All right, sir, and was he being questioned out there at the Department of Public Safety on that day?

A. That morning, I didn't question him.

Q. All right, did you question him some that afternoon?

A. Yes, sir, I did.

Q. What was the longest period of time you ever questioned him, longest period of one given time that you ever questioned him?

A. On that day?

Q. Yes, sir.

A. Fifteen minutes.

Q. All right, sir. Did you observe others questioning him?

A. Yes, sir, I did.

Q. Did he have opportunities to rest in between people talking to him and questioning him?

A. Yes, sir, he did.

Q. All right, did you threaten the defendant out there that day, Mr. Wood?

A. No, sir, I did not.

Q. Did you tell him words substantially to the effect that "You'd better confess, you so-and-so," meaning bad language, "or I'll take you out to the grave and whip you." Did you say that to him?

[fol. 690] A. No, sir, I did not.

Q. Or words to that effect?

A. No, sir.

Q. Did you say to him words to this effect, "You believe I'll do that?" meaning what I just got through talking about?

A. No, sir, I did not.

Q. Did you draw back as if to strike this defendant out there on Monday?

A. No, sir.

Q. Did you call him bad names of any kind?

A. No, sir, I did not.

Q. Did you try to force a confession out of him?

A. No, sir.

Q. Was this questioning going on in the polygraph offices there in the Department of Public Safety?

A. Yes, sir, it was.

Q. And were people coming and going while this questioning was going on?

A. Yes, sir.

Q. Is there a mirror or two-way glass where people can see in and what is going on while the questioning is going on?

A. Yes, sir, there is a two-way glass between the observation room and the lie detector room.

Q. And can you hear from the outside what is going on [fol. 691] in the inside?

A. Yes, sir, there is an amplifier built in.

Q. All right, sir, did you see anyone abuse this defendant out there on Monday?

A. I did not.

Q. How many times did you question him on Monday, if you know, sir?

A. I just questioned him the one time.

Q. Did you observe him out there on Monday morning?

A. Yes, sir, I did.

Q. Was he abused in any way out there on Monday morning?

A. No, sir, he was not.

Q. Threatened in any way?

A. No, sir.

Q. Was he allowed rest periods between questioning on Monday morning?

A. Yes, sir, he was.

Q. All right, sir, did you see him on Tuesday, the 10th?

A. No, sir, I didn't see him on the 10th.

Q. All right, sir, what about Wednesday, the 11th?

A. Yes, sir, I saw him on July 11th.

Q. Did you see him at the city police station that morning?

A. Yes, sir, I did.

[fol. 692] Q. About what time was it, if you know?

A. 6:55 A.M.

Q. Do you know whether or not he had any breakfast that morning?

A. I don't know. I asked him if he was hungry or if he had had breakfast, and he said he wasn't hungry.

Q. All right, sir, and then did you all go to Borger from there?

A. Yes, sir, we did.

Q. Who went along, please, sir?

A. Wayne Merritt, a chemist, and Jesse Morales and the defendant.

Q. All right, sir, was the defendant abused in any way on the road to Borger?

A. No, sir, he was not.

Q. Was he cursed or threatened in any way on the way to Borger?

A. No, sir, he was not.

Q. Was he allowed to smoke, sir, on the way to Borger?

A. Yes, sir, he was.

Q. Was anyone trying to force a confession out of him on the way to Borger?

A. No, sir, there was not.

Q. Once you arrived at Borger, did you go to his truck?

[fol. 693] A. Yes, sir, we did.

Q. And did you participate in searching the truck?

A. Yes, sir, I did.

Q. Did you have permission to search the truck?

A. Yes, sir, we did.

Q. Did the defendant give you the permission?

A. He did.

Q. A written permission or oral?

A. I believe there was a written permission down at the police station before we left, and we made a call to locate the truck. He thought it might be in Oklahoma, but we found that it was in Borger before we left Midland.

Q. All right, sir. Now, once that you got up to the truck, did the defendant visit with anyone up there or not?

A. Yes, sir.

Q. Whom did he visit with?

A. I believe it was his brother-in-law. He said his name was Owens.

Q. Up there at the truck in Borger, sir, did you curse the defendant?

A. No, sir, I did not.

Q. Did you threaten or abuse him in any way?

A. No, sir, I did not.

Q. Was or was he not offered food in Borger?

[fol. 694] A. He was.

Q. And did he have anything to eat or drink in Borger?

A. I believe he had some milk to drink up there.

Q. Is it your best recollection that he did or did not have milk to drink up there?

A. He had milk.

Q. O.K. Then from Borger did you come back to Midland?

A. Yes, sir, we did.

Q. Was he abused in any way on the way from Borger to Midland?

A. No, sir, he was not.

Q. Was he cursed on the way from Borger to Midland?

A. No, sir.

Q. Was he allowed to smoke?

A. Yes, sir.

Q. Now when you arrived in Midland, did you take him to the Department of Public Safety or to the city police station, or where?

A. We stopped by the Department of Public Safety to

let the chemist out and then we went on directly to the police station, and I didn't get out of the car.

Q. All right, sir.

A. I let Morales and the defendant out.

Q. All right, sir, at the police station.

[fol. 695] A. Yes, sir.

Q. About what time was this that you arrived at the police station?

A. 7:15 P.M.

Q. All right, sir, we move to Thursday, July 12, 1962. Did you see the defendant on that day?

A. Yes, sir, I did.

Q. Was that out at the Department of Public Safety?

A. Yes, sir, it was.

Q. And did you see him both morning and afternoon or just one or the other?

A. I saw him both morning and afternoon.

Q. While he was being questioned out there, did you observe him?

A. I did.

Q. Did he have rest periods in between the questioning?

A. Yes, sir, he did.

Q. Did you abuse him in any way out there on Thursday?

A. I did not.

Q. Did you see anyone else abuse him in any way out there on Thursday?

A. No, sir, he wasn't abused out there.

Q. Anybody curse him?

A. No, sir.

[fol. 696] Q. Anybody threaten him?

A. No, sir.

Q. Anybody try to force a confession out of him?

A. No, sir.

Q. Anybody strike him with their fist, hit him in the stomach?

A. No, sir.

Q. All right, sir, did you say to him words to this effect, "I'll take you back out to the grave and whip you, you so-and-so"? Did you say words to that effect to this defendant?

A. No, sir, I didn't.

Q. Did you threaten to strike him on Thursday out there?

A. No, sir.

Q. All right, on this day while he was being questioned out there, was he still in the offices of the polygraph operator?

A. Yes, sir.

Q. Were people allowed to come and go while the questioning was going on?

A. Yes, sir.

Q. You still had this two-way glass there where people could see in. Is that right?

A. Yes, sir.

[fol. 697] Q. The visible layout was the same as it was on Monday. Is that right?

A. Yes, sir, it was.

Q. All right, sir. Now, I call your attention to the afternoon of Thursday. Were you present when the defendant signed a statement?

A. Yes, sir, I was.

Q. After the defendant signed the statement, did the defendant make any comment about his condition?

A. Yes, sir, he did.

Q. What did he say, please?

Mr. Legg: Your Honor, there, again, we want to object to any such question as being an extrajudicial statement, the one in writing being the only one involved.

Q. Proceed, Mr. Wood.

A. Would you repeat the question, please?

Q. After he signed the statement—you said you were out there when he signed the statement—after he signed it, did he make any comments about his condition?

A. Yes, sir, he said he was hungry and that the knot was out of his stomach.

Q. Did he say anything else that you can recall?

A. He said he had gotten it straightened out with the Lord.

[fol. 698] Q. All right, anything else, or is that it?

A. No, sir, that's it.

Q. All right, sir. Was he abused in any way on Thursday, July 12, 1962, out there?

A. No, sir, he was not.

Q. All right, did you say to the defendant words to this

effect: "I have beat a lot of black so-and-sos and you believe it, don't you?" or words to that effect? Did you say anything like that to the defendant?

A. No, sir, I did not.

Q. All right, sir, one last question. Of all the times that you were with this defendant, in your presence and with him personally and what you observed of him, did you ever see any abuse of any kind to this defendant?

A. No, sir, he wasn't abused.

Mr. Smith: Pass the witness.

Cross-examination.

By Mr. Legg:

Q. John, where was he when he said he was hungry and that he got that knot out of his stomach, and so forth?

A. He was in my office out there.

Q. In your office.

A. Yes, sir.

Q. Anybody else there?

[fol. 699] A. I believe my secretary was there and Jesse Morales.

Q. What was the purpose of your questioning him, John?

A. I was assisting in the investigation of the murder.

Q. I know, but what were you trying to do to get him to do?

A. We were trying to solve the case.

Q. Well, I understand that. I said, what were you trying to get this defendant to do?

A. We were trying to get him to tell us the truth.

Q. All right, you were trying to get him to make a statement, weren't you?

A. We were trying to get him to tell us the truth, yes, sir.

Q. You never did say anything to him about making a statement?

A. Yes, sir, I sure did.

Q. What did you talk to him about?

A. I talked to him about the case. I don't remember exactly what was said.

Q. You said the other time you were up here that you don't know what you told him.

A. I don't remember, other than just talk about the case.

Q. Now, did you ever tell him Thursday, John, that "I'm tired of fooling around with you"?

[fol. 700] A. No, sir, I did not.

Q. "I want you to make that statement."

A. No, sir.

Q. And you never did make any threats against him.

A. No, sir, I did not.

Q. Of course you never did hit him, did you?

A. Would you repeat the question?

Q. You never did hit him, did you?

A. No, sir, I did not.

Q. And, so far as you know, he never has claimed that you did.

A. Well, I don't know about that.

Q. But, so far as you know, he never has claimed you hit him.

A. Not as far as I know.

Q. And how many times Thursday did you say you talked to him?

A. Would that be the 12th?

Q. Yes, sir.

A. Oh, I talked to him some on the way to Borger. You are talking about the 12th?

Q. Now according to your testimony, was that on the 12th?

A. No, no. I talked to him on the 12th about 12:45 right after noon when we got permission to search the car [fol. 701] down on a vacant lot, and then I talked to him about 3:00 P.M.

Q. For how long?

A. For about fifteen minutes.

Q. Is that your best recollection?

A. Yes, sir.

Q. Did you see him have anything to eat at all on Monday when he was out there?

A. On July 9th he had a carton of milk and was smoking a cigar.

Q. What time?

A. That was somewhere after 11:00 A.M., between 11:00 and 12:00.

Q. Between 11:00 and 12:00 he had some milk.

A. Yes, sir.

Q. Are you sure that wasn't a coke?

A. No, sir, I have down here "milk."

Q. You have down there "milk."

A. Yes, sir.

Q. Did you see him have anything else that day?

A. Sir?

Q. Did he have anything else that day?

A. I don't have it down; he could have. If he did I didn't put it down.

Q. What about Thursday? Did you see him have any-
[fol. 702] thing Thursday?

A. Now are we going back to the 12th?

Q. Yes, sir.

A. Milk and a cigar.

Q. When was that?

A. That was around 11:45 A.M.

Q. On Thursday, the 12th.

A. Yes, sir.

Q. Did you feed him in Borger? According to your testimony, I believe you did say he—you are pretty sure it was the 11th when you went to Borger. Is that right?

A. Yes, sir, it was on the 11th.

Q. Did you talk to him some on the way up there?

A. Very little. Jesse Morales sat in the back seat and talked to him. I was driving.

Q. Did you talk to him on the way back?

A. No, sir.

Q. Did you talk to him while he was up there?

A. Just very little.

Q. When you were out there at the truck, did you have a conversation with him?

A. One time I had to ask him to move out of the door so I could get in the truck.

Q. Move out of the door so you could get in the truck.
[fol. 703] A. Yes, sir.

Q. Was he trying to block it or anything?

A. He was sitting in the door.

Q. Sitting in the door.

A. Yes, sir.
Q. You are talking about the back——
A. I believe it was the side door, the driver's side.
Q. Where was he sitting?
A. On the running board.
Q. The truck had a running board.
A. Yes, sir.
Q. Did he have anything to eat while he was in Borger that day?
A. He had some milk. As far as I know, that was all.
Q. Did you get that milk for him?
A. No, sir, we stopped at a little drive-in grocery, and Morales got out and got him the milk.
Q. Was that after you had eaten lunch?
A. Yes, sir.
Q. You left him in the jail?
A. Yes, sir, we did.
Q. Then after that did you come on back to Midland?
A. Yes, sir, we did.
Q. You completed your investigation up there of the [fol. 704] truck before noon. Is that right?
A. Somewhere around noon.
Q. Somewhere around noon?
A. From 12:00 noon to 1:00 P.M.
Q. Now, you say you went in your car to Borger.
A. Yes, sir, we did.
Q. Why did you take this defendant to Borger, Sgt. Wood?
A. To search his panel truck.
Q. You had a Consent from him, didn't you?
A. Yes, sir, we did.
Q. Before you left.
A. Yes, sir.
Q. You knew where the truck was before you left here.
A. We were pretty sure it was in Borger, yes, sir.
Q. And you had contacted some officers up there to locate the truck, and they had told you it was located up there?
A. No, sir, we didn't contact the officers until we got up there.
Q. You didn't call them from out here at the DPS?
A. No, sir, I don't think so. We called somewhere in Oklahoma to see if the truck was in Oklahoma.

Q. Did you find out it wasn't up there?

A. We found out it wasn't in Oklahoma.

Q. But you had previously contacted the authorities in [fol. 705] Borger?

A. No, sir, don't believe so.

Q. Not until you got there.

A. Not until we got there.

Q. Then you say the reason for hauling Marvin—how far is it to Borger?

A. It would be about two hundred and, I imagine, sixty-five or seventy miles.

Q. And the reason for hauling him that two hundred and sixty-five or seventy miles was just to point out the truck to you.

A. Yes, sir, it was.

Q. He had told you where it would be in Borger, if it was there, didn't he?

A. No, sir, he did not.

Q. Did he tell Sgt. Morales or anybody?

A. I don't know.

Q. Didn't ask them?

A. No, sir, I didn't.

Mr. Legg: That's all.

Redirect examination.

By Mr. Smith:

Q. Mr. Wood, was the defendant offered food other than the milk—was he offered food in Borger?

[fol. 706] A. Yes, sir, he was.

Q. And now we go to Thursday when you said you were searching cars here. Was he offered food that day at lunch time?

A. Yes, sir, he was.

Q. Did you ever see him when he was in the county jail here in Midland after he had been transferred from the city jail to the county jail? Did you ever see him any more?

A. No, sir, I did not.

Q. You did not see him here in the county jail at all?

A. No, sir.

* * * * * * *

Récross-examination.

By Mr. Legg:

Q. Now, Sgt. Wood, were you present when he made the statement out there Monday afternoon?

A. Yes, sir, I was.

Q. And in that statement did he say that Dorothy Mae Clewis had met her death by being shot with a gun?

A. He said he had shot her.

Q. And did you sign a complaint in the Justice Court down here that night charging with the offense of murder with malice aforethought?

[fol. 707] A. I don't remember.

Q. Does that look like your signature? (Shows document to witness.)

A. Yes, sir, that is my signature.

Q. And what does that say about—that part down here. (Refers to the document.)

Mr. Smith: If it please the Court, the complaint is not admissible.

Q. All right, let me ask you this, then: and did you sign the complaint saying that Marvin Clewis——

Mr. Smith: Now your Honor, that is the same thing. This thing is not admissible in evidence.

Mr. Legg: I can question him about it, your Honor. It don't have to be admitted in evidence I can talk about it.

Mr. Smith: Go ahead. I don't care; it doesn't make any difference. It is inadmissible, but go ahead.

Q. (Reading aloud) "That about the 21st of January of 1962 that Marvin Clewis did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewis by shooting her with a gun."

A. Now what was your question?

Q. Did you sign it?

A. Yes, sir, I did.

[fol. 708] Q. All right, and where did you get—do you have any idea where you got the date of the 21st of January?

A. I believe it was from a Missing Person report.

Q. From a Missing Person report.

A. Yes, sir.

Q. About what time did you file this complaint before the justice of the peace? Do you remember?

A. I don't remember.

Q. Do you know whether or not Marvin Clewis had ever been taken before a magistrate until that time?

A. No, sir, I don't know.

Q. Was that after dark on Monday night?

A. I just don't remember.

Q. Well, if the records of the justice of the peace show 7:55 P.M., you wouldn't quarrel on that, would you?

A. No, sir, I would not.

Q. All right. Does that sound about right to you?

A. I don't remember; it could have been.

Q. You didn't make any notes as to when you filed the——

A. No, sir, I did not.

Q. He had already signed one statement, but you felt it was necessary to get him to sign another one on Thursday?

A. Well, we figured the first one he signed wasn't the truth.

[fol. 709] Q. You did?

A. Ye, sir.

Q. But you took it anyway.

A. Yes, sir.

Q. Knowing or figuring it wasn't true.

A. We didn't think the first one was true.

Q. Do you think the second one was true?

A. Yes, sir, I do.

Q. That is the one that brought in the business about the belt.

A. Yes, sir.

Q. In all material respects, are the statements about the same other than that? Do you recall?

A. As well as I recall, yes, sir.

Mr. Legg: I believe that is all.

Mr. Smith: We have no more questions.

* * * * * * * *

[fol. 710] MARVIN CLEWIS, the Defendant, being recalled by the Defense, testifies further as follows:

Redirect examination

By Mr. Legg:

Q. Marvin, did you ever see this belt that was put in evidence by the State in this case, or is this your belt?

[fol. 711] A. No, sir.

Q. Back there in January of 1962, were you about the same size as you are now?

A. Yes, sir.

Q. You weigh about what?

A. About 190.

Q. Am I pulling this (belt) tight around you? (Demonstrates with belt around the defendant's body.)

A. Yes, sir.

Q. Is the buckle over here?

A. Yes, sir.

Q. Is there a hole in this end of the belt right here?

A. Yes, sir.

Q. Is there another hole down here?

A. Yes, sir.

Q. And another hole down here.

A. Yes.

Q. Did you ever see what has been introduced in evidence by the State as Exhibit 2?

A. If I did I don't remember it.

Q. Do you know whether or not Dorothy Mae had a brassiere like that?

A. I know she had a red one but not one like that.

Q. She could have had one,—

[fol. 712] A. Yes, sir.

Q. —but you don't know.

A. No, sir.

Mr. Legg: No further questions.

• • • • • • •

ANNIE MAY OWENS, a witness for the Defendant, after first being duly sworn, testified as follows:

Direct examination

By Mr. Legg:

Q. Your name is Annie May Owens?
A. Yes, sir.
Q. And you are the sister of Marvin Clewis. Is that right?
[fol. 713] A. Yes, sir.
Q. Annie May, you remember when Marvin was picked up, don't you.?
A. Yes.
Q. For the murder of his wife?
A. Yes, sir.
Q. Did you go to the police station that afternoon?
A. Yes, sir.
Q. And did you see Marvin?
A. I saw him that Sunday.
Q. That Sunday.
A. Yes, sir.
Q. Did you see him alone at any time?
A. No, sir..
Q. Were the officers in there all the time you talked to Marvin Clewis?
A. Yes, sir.
Q. When was the next time you saw Marvin?
A. I didn't see him any more.
Q. Well, now, you saw him after that, though, at some time, didn't you?
A. No, sir. After I went up there that Sunday, I went back but I didn't see him any more. They wouldn't let me see him no more.
[fol. 714] Q. They wouldn't let you see him any more?
A. No, sir.
Q. Over at the city?
A. Oh, yeah, they let me saw him at the city. I looked through a little hole.
Q. You looked through a little hole and saw him.
A. Uh huh.

Q. When was that?

A. On a Friday.

Q. Now was that at the jail? Which jail was that—the jail in this courthouse or the jail at the other place?

A. It was at the county.

Q. County?

A. Uh huh.

Q. That is when you saw him, on a Friday?

A. Uh huh.

Q. Did you go back to the police station and try to see him Monday, Tuesday, Wednesday or Thursday, or any or all of those days?

A. Yeah. They wouldn't let me see him.

Q. How many times did you go down there?

A. I went there twice.

Q. You went down there twice?

A. Uh huh.

[fol. 715] Q. And you told them you wanted to see Marvin?

A. Yeah.

Q. And they wouldn't let you see him.

A. No. He told me. I asked him if I could see him. He said, "You are his sister?" I say, "Yes, I am his sister." He said, "Well, you can't see him." I say, "Why I can't see him?" He say, "You just can't see him."

Q. So Sunday then you didn't see him. The only times you saw him over at the police station was on Sunday afternoon, and the officers were present.

A. Yeah, that's the only time I saw him.

Q. And then you didn't see him until he came over to the county jail on Friday.

A. Uh huh.

Q. Annie May, had you contacted a lawyer to talk to Marvin?

A. Naw, I hadn't contacted him then. I intended—I was going to ask Lawyer Harris.

Q. And did you ask Lawyer Harris to go see him?

A. Yes, sir, I asked him. He went to see him.

Q. You know when he went to see him?

A. I don't know if it was on a Monday or on a Tuesday or when it was.

Q. Was it the day he came to the county or not?

[fol. 716] A. Yes, sir, he went to see him and they sent him to the county. I believe it was the next day they sent him to the county.

Q. The same day he went to see him they sent him to the county.

A. Yes, sir.

Q. Did you ever hire Lawyer Harris to represent him?

A. No, sir, I didn't.

Q. Why?

A. I just never did.

Q. Was it because you couldn't get the money?

A. Yes. He told me it would take a thousand dollars, and I knew I couldn't get that much money.

Q. All right. Now later on did you and some more of his family contact me?

A. Yes, sir.

Q. And do you remember when that was? Was it after Marvin had been over—let me ask you this: Was it after Marvin had been over at the county jail for a good long period of time?

A. Yeah, he'd been up there about two weeks.

Q. About two weeks.

A. Yes, sir.

Mr. Legg: That's all.

[fol. 717] Cross-examination.

By Mr. Smith:

Q. Mrs. Owens, you don't know of your own knowledge when Mr. Harris saw Marvin Clewis, do you?

A. No, I don't know whether it was on a Monday or Tuesday, but I know I went to his office one of those days. I don't know which one.

Q. Perhaps you misunderstood me. I say, you do not know of your own knowledge when Mr. Harris saw Marvin Clewis.

A. That's what I said; I don't know what day he saw him.

Q. I see. Thank you.

Mr. Smith: That is all.

Redirect-examination.

By Mr. Legg:

Q. During the time that you were visiting Marvin Sunday afternoon, was any food brought to him?

A. No, wasn't no food brought to him.

Q. No food at all while you were there.

A. No.

* * * * * * *

[fol. 718] Mrs. James F. Burford, called as a witness by the Defense, and having previously been sworn and testified as a witness for the State, testifies further, as follows:

Direct-examination.

By Mr. Legg:

Q. You are the same Mrs. James Burford who testified here Thursday, are you not?

A. Yes, sir, I am.

Q. And I believe you said Dorothy Mae Clewis had worked for you about four years.

A. Yes.

Q. Now during that time, Mrs. Burford, did anybody ever communicate to you a threat against Dorothy Mae Clewis' life?

Mr. Smith: May it please the Court, this is rank hearsay, and we object to it in every way as rank hearsay.

The Court: Sustained.

Mr. Legg: Your Honor, we would ask that the jury be excused. We want to go into this.

The Court: The jury will retire, please.

Jury Retired

Mr. Legg: May I ask the witness a question for the purpose of this objection?

The Court: Yes.

[fol. 719] Q. Mrs. Burford, when was such threat communicated to you?

A. About 4:00 o'clock the afternoon she left about 2:00.

Q. After you had paid her the check that has been introduced in evidence.

A. Yes.

Q. Then she left about 2:00, and about 4:00 o'clock then, did you receive a telephone call?

A. Yes.

Q. And who was that from?

A. I don't know her name. It was a woman and she asked if Dorothy Mae was there and I said no. She said, "When will she be back?" and I said "Monday," and she says, "Well, you'd better tell her to stop running around with my husband," or she would kill her, and I told her to call her husband or talk to her minister or somebody, but what Dorothy Mae did after she left my place I couldn't say.

Q. You certainly wouldn't know anything about that, but this did happen, didn't it?

A. Yes, it did.

Mr. Legg: Now, your Honor, we would submit that this testimony is very vital in this case. There is nothing here but circumstantial evidence. This is not hearsay. Hearsay represents something that could be the truth about what [fol. 720] somebody says. Now the jury is going to be the judge as to the truth. This is not hearsay, though. This has a very vital bearing on who killed, if anybody did, Dorothy Mae Clewis, and we believe that we are entitled to get this in evidence. It is certainly vital in a case which, outside of this confession, is purely circumstantial and, after all, this is the only way that it can be done. Now the jury can speculate if they want to as to what happened, but this is vital to our case, and we strenously ask that the Court permit us to introduce this evidence.

Mr. Smith: Your Honor, please, whether it is vital or not, it is not the turning point. No. 1, it is not a circumstantial evidence case. Any time there is a confession, it is not circumstantial. It is direct, but that's not the point in here. The point is, this is the rankest of hearsay. There is no way in the world for us to cross examine who it is alleged made this threat; there is no way in the world for

us to go to who made it; there is no way for us to reach that person; it is just completely rank hearsay of the rankest order, and it is not admissible in any way. It is just complete rank hearsay and would be a great injustice to the State if this sort of evidence were allowed to come in. It is clearly not admissible, and we strenously object to it.

Mr. Legg: Now let me say to you that this is not [fol. 721] hearsay, it is not part of hearsay.

The Court: The Court will let it go in. Bring the jury back in.

Jurors Resume Seats in Jury Box

Q. (Mr. Legg) Mrs. Burford, I believe the question that I had asked you was: During the time that Dorothy Mae Clewis worked for you, did anybody, a third person, communicate to you a threat against her life?

A. Yes.

Q. And when was that?

A. On the afternoon of January 19th, about 4:00 o'clock, after Dorothy Mae had left about 2:00, a lady called and wanted to speak to Dorothy Mae. I told her she wasn't there and would be back on Monday. She then said that if Dorothy Mae didn't stop running around with her husband she was going to kill her.

Q. All right, and she told you to tell Dorothy Mae that?

A. Yes.

Q. Now, did Dorothy Mae ever come back to work for you?

A. No, she never came back. I was going to fire her on Monday when she did, but she never showed up.

Q. All right, did this person identify herself?

A. I didn't ask her name. I asked who her husband was [fol. 722-734] and she gave me that name.

Q. Did she tell you who it was?

A. Yes.

Q. Who? Who did she say it was?

A. Jimmy Davis.

Q. Now did that person, whoever it was that talked to you—you say that was a woman?

A. Yes.

Q. It was a woman's voice. Did it sound like or could you distinguish—of course, you have had some experience

—could you express an opinion as to whether that person was a white person or a colored person?

A. I believe she was colored, and I believe she had been drinking.

Mr. Legg: I believe that is all.

Cross-examination.

By Mrs. Smith:

Q. What was that last statement? You believe she had been drinking?

A. Drinking.

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[fol. 735] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

PLAINTIFF'S EXH. 13

VOLUNTARY STATEMENT

THE STATE OF TEXAS,
County of Midland:

I, Marvin Peterson Clewis, being in custody of the Sheriff of Midland County, Texas, having been first warned by Gene Howell, Deputy Sheriff of Midland County, Texas, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on my trial for the offense concerning which this statement is made, do here make the following voluntary statement in writing to the said Gene Howell:

My name is Marvin Peterson Clewis. I was born August 31, 1926. I live at 1114 East Estes Street, Midland, Texas.

Sometime during the last few days of January, 1962, I came home from work a little before 9 PM one evening. I am not sure of the exact date. At that time I lived with my wife, Dorothy Mae Clewis, at 1400 East Davis, Midland. When I got home Dorothy Mae wanted me to go to a liquor store and get her some wine. I started out to the truck to go, and she said to wait a minute, and she would go with me. I asked her to put on more clothes. She just had on a thin housecoat. But she didn't put on any more and just got in the truck with me. We then drove out the Andrews Highway to a liquor store and I went in and got some Mogan David wine. We then started back toward Midland. I drove down a dirt road that runs to the left this side of the liquor store. Dorothy Mae started fussing at me because I got home late from work. She said that I had been going by my ex wife's house before I came home. I told her so what. I told her that she had been going off and staying three or four nights at a time. Dorothy Mae told me not to talk so smart, and she was cussing. About that time she picked up something and hit me with it. I pulled the truck over and slammed on the brakes. This was after the dirt road joined the pavement. Dorothy Mae and me started tusseling and fighting. I wretched down to get

something to hit her with, and I come up with a belt that was either in the seat or the floorboard. I hit her across the face and head with the buckle end of the belt. She was still fighting, so I grabbed her and started choking her. I put the belt around her neck and choked her. One of us must have hit the door latch cause we both fell out of the truck. I fell one way and she fell the other un. I got up, and Dorothy Mae groaned seems to me like two or three times. I picked her up and started calling to her. She didn't answer. I helt her up close to my face and listened to see could I hear her breathing. I figured I had choked her to death. So I laid her back down and got back in the truck and started to leave. I thought about trying to hide her somewhere so I got back out and picked her up and carried her over a little sand hill north of the road. I thought about hiding her behind some bushes, and then I remembered that I had a shovel in the truck, so I laid her down and went back and got the shovel. I went back over the little hill and started digging by the place I had laid Dorothy down. I dug a hole and I placed her in it. She didn't have on any clothes because the housecoat had torn off in the truck. The belt that I had choked her with was still around her neck. I then covered her up with sand.

I was angry and mad at the time that we were fighting, and I was sure angry when I was choking Dorothy Mae. I dug the hole and put her in it because I knew that I had done wrong, and I was hoping that nobody would never find her body. When I was choking her I really pulled down hard on the belt. After I had buried her, I got in the truck and went on home. I carried the housecoat into the house the next morning, and put it into the dirty clothes. The housecoat I believe that I later threw away. All the fighting and choking took place in Midland County, Texas, and I buried Dorothy Mae in Midland County, Texas.

I can read and write, and I will read this statement in full befor I sign it. I will also have it read to me as I look at a copy before I sign it. I have not been threatened in any way to cause me to make this statement. I am making it because it is the truth. End of Statement.

Marvin Peterson Clewis.

Witnesses:

Guy Fletcher, Melba Dickinson, [Copy Illegible]

[fols. 736-737] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

PLAINTIFF'S EXH. 14

CITY OF MIDLAND

Office Memorandum

To: To Whom it May Concern:
Subject: Owner Consent:

Date July 11, 1962.

This is Permission for the Officers to search my Panel truck and my room in Borger, Texas.

Marvin Clewis.

Witness:

Sgt. Black, Martha Terry.

[fol. 738] CERTIFICATE OF COURT REPORTER, (omitted in printing.)

[fol. 739] CERTIFICATE OF THE JUDGE PRESIDING

The within examined, found correct, approved and ordered filed as the Statement of Facts in the foregoing styled and numbered cause upon its merits and the Motion of the Defendant as set out in Volume I of the record, on this 19 day of October, A. D. 1964.

Perry D. Pickett, District Judge, 142nd Judicial District of Texas.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 740]

Supplemental Transcript of Record

In the District Court of Midland County, Texas

Defendant's Motion for Instructed Verdict and Ruling Thereon—May 15, 1964

At the close of the State's evidence and at a time after the State has rested, and out of the presence of the jury, comes now the Defendant, Marvin Clewis, and moves the Court to direct and instruct the jury in this case to return a verdict of not guilty in favor of this defendant, for and upon the following grounds and reasons, to-wit:

I

The defendant would show the Court that under the evidence the corpus delicti of the offense charged on the indictment has not been proved, but to the contrary that there is a total absence of proof of the corpus delicti.

II

That the instrument in writing which has been introduced in evidence by the State purporting to be a voluntary statement on the part of Marvin Clewis, which statement is dated July 17, 1962, and has been introduced in evidence as State's Exhibit 13, has not in anywise or measure been corroborated by the evidence which has been presented to the jury by the State; that the State has wholly failed to discharge its burden of proof with reference to the corroboration of such statement.

III

That there is a material variance in the indictment and the proof; that the indictment in this case alleges that the offense was committed on or about the 21st day of January, 1962; that there is no evidence to substantiate such date, which appears from the evidence to have been on Sunday, but that the principal evidence upon which the [fol. 741] State would convict this defendant, to-wit, the

confession of Marvin Clewis, clearly shows that a trip had been made to a liquor store and the Court's entitled to take judicial notice of the fact that no liquor stores in the State of Texas are permitted to operate on Sunday.

IV

That the confession or "voluntary statement" upon which the State relies for conviction in this case was not, in fact, a voluntary statement but was produced and obtained, as the evidence has shown to this Court, by use of of means which deprived this defendant of his rights under the Fifth, and Fourteenth Amendments to the Constitution of the United States. For this purpose defendant incorporates in this Motion the contents of the Motion previously filed and ruled upon by the Court and denominated "Motion to Suppress and Exclude the State's Confessions." Such statement, as introduced by the State, was obtained as a result of fear, coercion, threats, persuasion and intimidation, which persisted at the time of the taking of such statement, the evidence showing that defendant had been subjected to illegal detention, that he made a previous statement on July 9, 1962, after two days of questioning and interrogation beginning at 6:00 or 6:30 A.M. on July 8, 1962, and continuing until sometime in the early evening hours of July 9, 1962, and during which time this defendant, according to the uncontroverted evidence in the case, did not have proper food or rest, the evidence showing from the State's own witnesses that this defendant, during such period of time, had nothing to eat from 6:30 or 7:00 o'clock on July 8, 1962, immediately after he was taken into custody without a warrant by Officer Jesus Morales, of the Midland Police Department, until after he had signed such statement, except a Coca-Cola and some milk, the milk having been given to him on only one occasion, that being just prior to the time he signed such statement, defendant's evidence showing that he did not receive any milk until after he had signed such statment. That as a result of such treatment at the hands of police officers [fol. 742] he was weakened to the extent that his will was overborne by the actions of the officers and by his condition at that time. In this connection, Defendant also renews the Motion previously offered and given to the Court.

V

That there is insufficient evidence upon which this jury can base a verdict; that the uncontroverted evidence shows that this defendant, at material steps in the proceedings of this cause, was not represented by counsel, the evidence further showing that this defendant is an uneducated Negro man who completed the fifth grade in school.

VI

Because the circumstances and conditions which surrounded the taking of the first two statements by officers of the Midland Police Department on July 9th and July 12th persisted and continued and that the improper influences exercised in obtaining those two statements over the period of time from July 8th through July 12th did enter into and influence the making of the subsequent statement given to officers Howell and Fletcher and introduced in evidence herein as State's Exhibit 13.

For all of which grounds and reasons, the defendant respectfully moves the Court to instruct the jury to return a verdict of not guilty in this case.

Marvin Clewis, Defendant, By: Reagan H. Legg, Attorney for Defendant.

Perry D. Pickett.

The Court: Overruled, 5-15-64.

[fol. 743] [File endorsement omitted.]

[fol. 744] IN THE DISTRICT COURT OF MIDLAND, TEXAS

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS TO THE JURY—
Filed May 16, 1964

To the Honorable Perry D. Pickett, Judge of Said Court:

Comes Now Marvin Clewis, defendant in the above entitled and numbered cause, and after the evidence has been completed and after both the state and the defendant have closed, in the absence of the jury and prior to the reading of the Charge of the Court to the jury, respectfully submits to the Court the attached special requested instructions to be included in such charge, and moves the Court to include such requested instructions in his charge to the jury.

Marvin Clewis, Defendant, By: /s/ Reagan H. Legg,
His Attorney.

[fol. 745] [File endorsement omitted.]

[fol. 746] DEFENDANT'S REQUESTED INSTRUCTION No. 1

Bearing in mind the above instructions, do you find from the evidence, or do you have a reasonable doubt, that the defendant, at the time he made or signed the written statement before you, was in a state of apprehension or fear, viewed alone from the standpoint of the defendant himself at the time and place in question, that threats, coercion, persuasion, duress, fraud, withholding of food from him or prevention of sleep would be used to secure such statement?

Answer: Yes or No. Answer:—

If you have answered the foregoing question Yes, then you are instructed that you cannot consider the alleged "voluntary statement" heretofore introduced in evidence before you for any purpose and the same is here and now withdrawn from your consideration for all purposes, and you are instructed to disregard the same as fully as if it had never been presented to you.

Filed with Court and Refused this the 16th day of May, 1964.

Perry D. Pickett, Judge Presiding.

[fol. 747] [File endorsement omitted.]

[fol. 748] DEFENDANT'S REQUESTED INSTRUCTION No. 2

You are instructed that all of the evidence shown which the state relies upon for a conviction in this case, except for the alleged "voluntary statement" which has been submitted to you, is circumstantial evidence. Therefore, if you have answered "Yes" to the preceding question pertaining to whether or not such statement was made and given freely and voluntarily, as that term has been defined from you, then you will be bound by the instructions contained in the following two paragraphs:

In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged.

But in such cases, it is not sufficient that the circumstances coincide with, account for, and therefore render probable, the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis, except the defendant's guilt, and unless they do so, beyond a reasonable doubt, you will acquit the defendant and find him "Not Guilty".

Filed with Court and Refused this 16th day of May, 1964.

Perry D. Pickett, Judge Presiding.

[fol. 749] [File endorsement omitted.]

[fol. 750] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

DEFENDANT'S MOTION FOR INSTRUCTED VERDICT AND RULING THEREON

Comes Now the defendant, Marvin Clewis, at the close of the evidence and prior to the submission of the Charge of the Court to the jury and once again renews his Motion for Instructed Verdict made at the close of the State's evidence in this case for and upon the same grounds and reasons as stated therein and asks the Court at this time to instruct this jury to return a verdict of not guilty in this case. This motion is made with and upon the understanding that all the grounds as set forth in the previous Motion shall be incorporated in this Motion and made a part of the record in this case.

Wherefore, the defendant respectfully prays the Court to instruct the jury to return a verdict of not guilty herein.

Marvin Clewis, Defendant. By /s/ Reagan H. Legg, P.O. Box 107, Midland, Texas, his Attorney.

The Court: Overruled.

[fol. 751] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

DEFENDANT'S OBJECTIONS TO THE COURT'S CHARGE AND RULING THEREON

Comes Now the defendant, Marvin Clewis, at the close of the evidence and out of the presence of the jury and prior to the time that the Charge of the Court has been read to and submitted to the jury and objects and excepts to the Court's Charge for and upon the following grounds and reasons, to-wit:

I

The failure of the Court to include in its Charge Defendant's Special Requested Instruction No. 1, which requires the jury to specifically find whether or not the so-called voluntary statement introduced by the State in this case was in fact a voluntary statement for the reason that the jury is determining a fact issue in this case; that the jury should be required and should come to a definite, firm conclusion and answer as to the voluntariness of the statement in evidence; that the jury should be required to specifically find upon this question for the reason that there is no other evidence in this case outside the confession which would establish beyond a reasonable doubt that the defendant was guilty of any offense. The defendant is entitled to such a finding for the reason that in the event the jury should find, as defendant contends, that such confession was not made without persuasion and compulsion, then and in that event, the defendant would be entitled to an instruction on circumstanial evidence as is presented in Defendant's Special Requested Instruction No. 2.

Defendant further excepts and objects to the Court's Charge for the Court's failure to submit Defendant's Special Requested Instruction No. 2 with reference to a charge [fol. 751] on circumstanial evidence. The record shows beyond any question that unless the jury considers a confession as evidence of guilt of Marvin Clewis, then and in that event, there is no direct evidence in this case which would convict him of the offense charged in the indictment.

For that reason, and all other evidence in the case which might link Marvin Clewis to this crime, if any were committed, being of circumstanial nature, the Court should submit to the jury the law on circumstantial evidence in order that they might be governed thereby in considering all other evidence in this case.

Defendant further excepts and objects to the Court's Charge for the reason that the language contained in paragraph number six therein states that the term used in the indictment means "at any time prior to the return of the indictment of this case on the 12th day of September, 1962." This is contrary to law and does not put the burden upon the State to establish with some degree of certainty the date alleged in the indictment, to-wit, the 21st day of January, 1962. The time period which the Court permits the jury to use is far too remote and does not provide an adequate test nor does it require the State to discharge the burden of proof placed upon it in all criminal cases.

For all of which reasons the defendant objects to the Charge of the Court and again requests that his Special Requested Issues be included therein.

Marvin Clewis, Defendant. By: /s/ Reagan H. Legg, P.O. Box 107, Midland, Texas, his Attorney.

The Court: Overruled.

[fol. 753] IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS

[Title omitted]

COURT'S FINDING OF FACT AND LAW—January 7, 1965

During the trial of the above numbered and captioned case the defendant raised the question of the admissibility of State's Exhibit No. 13, the confession of the defendant Marvin Clewis, on the grounds that it was involuntary. Out of the hearing of the jury, the defendant was then permitted to go fully into any and all evidence bearing on the question of whether or not the said confession was voluntary, and as to the question bearing upon whether or not, at the time the defendant gave the confession in question, he was under the influence of fears, improper influences, etc., claimed by him as influencing the making of two prior confessions, which were not introduced; and at the conclusion of such hearing the Court deemed the facts and the law against the contention of defendant and deemed the confession offered into evidence as being voluntary and admissible.

At the conclusion of the evidence introduced in said trial the Court was still of the opinion that the facts and the law were against the contention of the defendant in respect to his claim that the said confession was involuntary, and the Court deemed same voluntary and admissible in every respect under all the law and facts adduced at the trial. The Court at this date still deems said confession voluntary under the facts and the law, and orders the Clerk to forward these findings of law and fact to the Honorable Court of Criminal Appeals in a supplemental transcript.

Perry D. Pickett, District Judge of Midland County, Texas.

[fol. 754] [File endorsement omitted.]

[fol. 755] CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD OMITTED IN PRINTING.

[fol. 756] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 37,483

MARVIN CLEWIS, APPELLANT,

vs.

THE STATE OF TEXAS, APPELLEE

Appeal from Midland County

OPINION—October 4, 1965

The conviction is for murder; the punishment, twenty-five years.

The state's evidence shows that on July 5, 1962, the skeleton of a human being—which was identified by dental bridge work as that of appellant's wife, who had been missing from her home since the latter part of January—was found in a shallow grave northwest of the city of Midland, off Farm Road 868. When found, the body had the wife's brassiere around the legs and a belt, identified as belonging to appellant, around the neck.

A written statement made by appellant to deputy sheriff Gene Howell, of Midland County, on July 17, 1962, after being duly warned, was introduced in evidence as state's exhibit No. 13. In the statement, appellant admitted that he choked his wife to death with a belt during the latter part of January while the two were tussling and fighting in his truck parked on a dirt road out from Midland. He further admitted having placed her body in a hole which he dug with a shovel and covering it with sand. In his statement, appellant related that when he buried his wife the belt with which he choked her to death was still around her neck. He further stated that he "was angry and mad" when they were fighting and that he was "sure angry" when he was choking her.

Testimony was offered by the state that on a Saturday [fol. 757] night in January, 1962, appellant had threatened to kill the deceased and had choked her.

Testifying as a witness in his own behalf, appellant

denied having killed his wife and repudiated his written statement introduced in evidence by the state.

An issue was raised by appellant at the trial as to the voluntary nature of the written confession and its admissibility in evidence. Such issue was raised by what was termed a "Motion to exclude and suppress state's confessions," which motion was heard by the court in the absence of the jury. After the motion had been by the court overruled, evidence was presented before the jury on the question of the voluntary nature of the confession and such issue was submitted to the jury in the court's charge, under appropriate instructions.

Appellant's first contention on appeal is that, under the record, the confession introduced in evidence as state's exhibit No. 13 was shown to be inadmissible as a matter of law and, for such reason, the case should be reversed.

Briefly, the evidence presented on the question of the admissibility of the confession shows that, after receiving word that his wife's body had been found and that the sheriff wanted to talk to him, appellant came from Borger —where he had been working—to Midland, on Saturday night, July 7, 1962, arriving at the sheriff's office around 11:30 p.m. After talking to deputy sheriff Kirksey for about an hour and a half, appellant was permitted to go, with instructions to return the next morning at 8 a.m. He then left the sheriff's office and went to the home of Elizabeth Johnson.

At 6 a.m., Saturday, Sgt. Jesus Morales, of the City of Midland police department, went to the Johnson home and [fol. 758] took appellant to the police station for questioning about his wife's death. Appellant was questioned at intervals during the day and also on that day was visited by his sister, Annie May Owens, his mother-in-law, Rachel Garnett, and Elizabeth Johnson. There was a dispute in the testimony as to whether he was questioned after midnight, appellant swearing that he was and the officer stating that he was not.

On Monday, July 9, appellant was taken from the city jail around 7:30 a.m., by Sgt. Morales and Sgt. Kuykendall and the three proceeded to the place where his wife's body had been found. When appellant led the officers to

the hole in the ground he stated, " 'I guess that is where she was buried.' "

From the scene, appellant was then taken to the Department of Public Safety, where he was given a polygraph examination by Officer Burl Reed. During the afternoon, appellant was questioned and late that evening he made and signed a written statement to Sgt. Morales in which he admitted killing his wife by shooting her with a gun. After signing the statement, appellant was taken before a magistrate, when bond was set, and in default of bail he was then returned to the city jail.

There is a dispute in the testimony as to whether appellant was questioned on Tuesday, appellant stating that he was and Sgt. Morales testifying that he was not.

No claim was made by appellant that he was questioned on Wednesday, and there is a conflict in the testimony as to whether he was carried that day or the following day to Borger, where his truck was searched by the officers. Suffice it to say that he was carried on one of the two days to Borger, where the officers, with his consent, did search his truck.

On Thursday, July 12, appellant was again taken by Sgt. [fol. 759] Morales to the Department of Public Safety at Midland, where another polygraph examination was given him.

Following this examination, appellant gave a second written statement to Sgt. Morales in which he admitted killing his wife by strangling her with a belt.

On Friday, July 13, appellant was delivered by the city officers to the sheriff and placed in the Midland County jail.

There is no claim that appellant was questioned by anyone from Friday until Tuesday, July 17, around 10:30 a.m., when he was questioned by deputy Howell and district attorney Joe Mims and, after being duly warned, made and signed the written confession introduced in evidence.

The proof further shows that before appellant made and signed the third statement, which was introduced in evidence, he had consulted with an attorney.

In his testimony, appellant stated that he was threatened and physically abused by Sgt. Morales, Ranger John Wood, and polygraph operator Reed. This was denied

by them. Appellant also claimed that he was without food while in custody of the city police. Appellant's testimony was, in substance, that he signed the first two confessions because he was scared, sick, and hungry and that the reason he signed the third confession (state's exhibit No. 13) was because he was scared and afraid that he would receive the same treatment which he had received while in custody of the city officers; that he had already signed two statements and "didn't figure it made any difference."

Testimony was presented by the state that appellant was offered food which, on occasions, he would refuse. On other occasions he was given milk and soup, which was for a stomach condition he claimed he had.

[fol. 760] None of the officers who appellant claimed had threatened and physically abused him when he made the first two confessions were present when he made the third confession to deputy sheriff Howell.

In a supplemental transcript, certain findings by the trial court which were reduced to writing and filed in the trial court have been forwarded to this court, in which the trial judge certifies that at the conclusion of the hearing, in the jury's absence, he found the confession offered in evidence as being voluntary and admissible.

We have concluded to accept such belated entry and filing of the trial court's findings in passing upon the admissibility of the written confession, under the decision in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908.

While the record reflects that an issue was raised as to the voluntary nature of the confession, which issue was submitted to the jury, the evidence is undisputed that before appellant made the confession introduced in evidence, he had been taken before a magistrate, at which time charges were preferred against him and bail set. Further, appellant, while in custody, had been visited by relatives and friends and had consulted with an attorney.

Under the record, we are unable to agree that there are any undisputed facts which rendered the confession inadmissible as a matter of law. See: Lyons v. Oklahoma, 322 U.S. 596, 88 L.Ed.1481.

We have carefully examined the authorities, state, and

federal, cited by appellant, and do not deem them here controlling under the facts.

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977, is not here controlling, because in that case Escobedo asked to consult with counsel and his request was [fol. 761] denied. In the instant case, no request was made by appellant to consult with counsel at the time he made the confession.

By informal bill of exception, appellant complains that error was committed when officer Wayne Gideon was permitted to testify that after appellant signed one of the prior statements he said "I feel like I can eat something now. I have that knot out of my stomach. I go it all straight with the Lord." Appellant's objection to the testimony was on the ground that he was in custody and it was not admissible for any purpose.

We perceive no error, as the testimony related to appellant's acts and statements during his interrogation about the crime and was admissible on the issue of the voluntary nature of the confession. Such testimoney was in rebuttal of testimony offered by appellant on the question of the voluntary nature of his confession, and, as a part of the same transaction, was admissible under Art. 728, V.A.C.C.P.

We overrule appellant's remaining contention that the evidence is insufficient to sustain the conviction because his confession was not corroborated. The other surrounding facts and circumstances, when taken in connection with the confession, are sufficient to establish the corpus delicti under the rule stated in Kugadt v. State, 44 S.W. 989. See, also, Bosquez, v. State, 311 S.W. 2d 855, and Fruechte v. State, 316 S.W. 2d 418.

The judgment is affirmed.

Dice, Judge.

(Delivered October 4, 1965)

Opinion approved by the court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 762] [File endorsement omitted.]

[fol. 763] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Cause No. 37,483

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—FILED OCTOBER 19, 1965

To the Honorable Court of Criminal Appeals for the State of Texas:

Comes Now Marvin Clewis, appellant in the above entitled and numbered cause wherein this Honorable Court did, on October 4, 1965, render and deliver its opinion affirming his conviction for the offense of murder with malice, and files this Motion for Rehearing herein, representing to the Court that such opinion should be withdrawn as erroneous and the judgment of the District Court of Midland County should be reversed, for and upon the following grounds and reasons, to-wit:

I

This Honorable Court is in Error in its Holding that the Confession Introduced in Evidence was Voluntary and that it was Properly Received into Evidence over Objection by Appellant and after Motion to Exclude the Same, when the Uncontradicted Evidence Showed that such Confession was Obtained in Violation of Appellant's Rights Under and by Reason of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Court disposes of all of appellant's points with reference to the violation of his Constitutional rights under the Fourteenth Amendment with the statement that the authorities cited [fol. 764] by appellant are not deemed controlling under the facts of this case. We submit that a more careful examination of these authorities could only result in the opposite conclusion. The Court in its opinion neither affirms nor denies the statements of law contained in those cases, and we believe that they are sufficiently applicable

to the facts to warrant a more concise determination by this Court.

We shall attempt to follow the outline of appellant's brief with reference to these Constitutional points:

(A) The opinion of the Court fails to give any credence to the law as announced in *Williams* vs. *State* (Crim.App. 1920) *225 SW 177, Abston* vs. *State* (Crim.App. 1937) *102 SW2d 428, Reck* vs. *Pate, 367 U.S. 433, 81 S. Ct. 1541, 6 L.Ed. 948, Culombe* vs. *Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037*, and the other cases cited in our brief. None of these cases make any distinction between a situation in which a prisoner is taken before a magistrate some time between his confessions, and where he is not. In particular, the Culombe case did emphatically reject any such distinction. In that case, as here, the appellant was never advised of his right to keep silent. Even if he had been so advised, the Supreme Court has held in *Haley* vs. *Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 294* and in *Haynes* vs. *Washington, 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed. 2d 513*, that the warning and the statement that the confession was given "voluntarily" would have no significance if the evidence indicated coercion. Mr. Justice Frankfurter wrote in *Culombe* vs. *Connecticut:*

> "When interrogation of a prisoner is so long continued, with such purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained . . . Questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

[fol. 765] Clearly, no facts could be more clearly applicable to this now-established principle of Constitutional law

than are the facts of this case. There is no contradiction but that the questioning was long-continued prior to the first two confessions. The officers admitted and testified that it was. There is also no reasonable conclusion other than that the confessions were obtained as the result of this long and protracted questioning and the physical condition of this appellant.

(B) This Honorable Court states that appellant was visited by "relatives and friends" before making his confession, whereas the uncontradicted evidence shows that he was visited by them in the presence of the police officers, who were there at all times. Under the decisions of the Supreme Court of the United States, these circumstances are not sufficient to remove the case from the law as set forth in *Haynes* vs. *Washington* (U.S. S.Ct.) 1963 *373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed. 2d 513.* Again, this Court seems to take the position that the circumstances of the first two confessions have nothing to do with the circumstances of the third confession which was admitted in evidence. Even if the Court were justified in that position, the testimony of officer Howell *(S.F. 387)* verifies that appellant requested that he be allowed to "talk to someone" but that he did not do so. The officer testified that he attempted to make one telephone call for him, but was unable to reach the man and no further effort was made. The opinion in *Haynes* vs. *Washington,* supra, clearly condemns a confession obtained under these circumstances, particularly in view of appellant's testimony that, "They went and got Mr. Mims, and when they went and got him, why, I was scared because I could see it looked like the same thing happening all over again, that three or four days of abusing, and I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement because I had already made two statements and I didn't figure it made any difference. I had signed two." It must be remembered that this appellant [fol. 766] denied his guilt until the District Attorney talked to him, and until after failure of compliance with his request to the officers to talk to his "boss man." There was no offer to get a lawyer for him and none was summoned to advise appellant of his rights.

(C) The Court ignores the physical condition of this appellant at the time he made the first two confessions. We have briefed this proposition very thoroughly, and would simply call the attention of the Court in particular to the opinions of the Supreme Court of the United States in *Reck* vs. *Pate,* supra, and *Watts* vs. *Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, Stein* vs. *New York, 346 U.S. 156, 73 S.Ct. 1077, 93 L.Ed. 1522,* and *Payne* vs. *Arkansas; 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975.*

We would point out to the Court again that the Constitutional question is concerned *not* with whether the defendant *could* have slept or whether he *could* have eaten, but with his actual physical condition at the time the confession was made. It is also possible that the Court might have overlooked the testimony of officer Herman Wicker *(S.F. 608)* wherein the officer testified that less than one hour after signing the first confession he noticed that the appellant was sick and acted like he wanted to vomit and that he did so. The newspaper reporter, Cope Routh, testified *(S.F. 363)* that just prior to signing the first statement the appellant had said, "Just bring me some milk and I will give you a statement and sign it."

There were contradictions in these statements. In the first one, the appellant said that he had shot Dorothy Mae Clewis with a gun. In the second statement and in the one introduced in evidence he testified that he had choked her with a belt. We submit that all the circumstances demonstrate that appellant was sick, exhausted and—as he testified—hungry and scared.

[fol. 767] This case does not involve a hardened criminal, but instead an uneducated Negro man who had never before been in custody of the police. All of these things contribute to the "totality of the circumstances" which the Supreme Court of the United States has said must be inquired into and given consideration in determining whether or not the will of a person under arrest has been overborne. This Court simply cannot ignore these facts and their application to the principles of Constitutional law as enunciated by the Supreme Court of the United States.

It is also uncontradicted that this appellant did not have adequate sleep. The officers admit this and admit to some

night questioning. The newspaper reporter testified that Marvin Clewis seemed exhausted, that his eyes were bloodshot and wrote in the story that he had spent a "sleepless night" in city jail.

(D) This appellant had a right to remain silent but was not told that he did. In fact, all of the police officers and the Texas Ranger testified that they told him he ought to make a statement. Under the language of *Malloy* vs. *Hogan, 84 S.Ct. 1489,* these circumstances clearly require that the confession be excluded:

> 'It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same circumstances must determine whether an accused's silence in either a federal or state proceeding is justified."
>
> "Today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently secured and may not by coercion prove a charge against an accused out of his own mouth."

There is nothing in this record which shows that appellant was told that he had a right to keep silent. As appellant testified: "I didn't think I had no choice." [fol. 768] This procedure was far from the accusatorial procedure which this government must follow: it was in fact the inquisition.

The uncontradicted facts in this record simply cannot be ignored—nor can the clear and emphatic mandate of the Supreme Court of the United States with reference to the rights of an accused under the Constitution of the United States. When all these facts are taken together, as they must be in a case of this kind, it is difficult for appellant to understand how those facts can be said by this Court not to fall within the cases which we have cited at such length. This confession was not voluntarily obtained, and we believe that the Supreme Court of the United States will un-

doubtedly agree. We urge this Honorable Court to again re-examine the authorities in the light of the facts of this case and to withdraw its opinion and accord to this appellant the rights to which he is entitled under the Constitution of the United States of America.

II

This Honorable Court is in error in holding that appellant's rights under the Fourteenth Amendment to the Constitution of the United States and the protection afforded by the due process clause thereof were not violated by his arrest without probable cause and without a warrant by an officer who possessed no authority over the facts of the case, and that a confession taken after such arrest is admissible into evidence. What about Mr. Justice Stewart's opinion in *Beck* vs. *Ohio, 85 S.Ct. 223*? We would again call to the attention of this Court the language of that opinion:

> "An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment . . . When the Constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers [fol. 769] at the moment of arrest would "warrant a man of reasonable caution in the belief' that an offense has been committed. *Carroll* vs. *United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543* . . ."

The officer who arrested Marvin Clewis testified that he knew that no warrant could have issued for his arrest. This officer was not an investigating officer in this case and had nothing to base his arrest on except mere suspicion.

In *Wong-Sun* vs. *United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441*, Mr. Justice Brennan had this to say:

> "It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . *The threshold question in this case, there-*

> *fore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy. We think that no warrant would have been issued on the evidence then available . . .* To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."

Under the doctrine of *Mapp* vs. *Ohio, 367 U.S. 643, 81 S.Ct. 1684, 7 L.Ed.2d 1081,* and *Beck* vs. *Ohio,* supra, this arrest was unconstitutional. It was this arrest which produced a confession and which broke this appellant.

It certainly cannot be said that simply because this appellant was taken before a magistrate between the time of the first confession and the time of the third confession, the confession introduced in evidence is admissible in this case. The law is plain, but the opinion of this Honorable Court fails to discuss its significance here.

The violation of this appellant's rights in this regard requires the reversal of this case. It is absolutely uncontradicted that not only would a warrant not have issued for the arrest of Marvin Clewis at the time he was placed under arrest, but that the police officer knew this to be true. *(S.F. 272)* In the opinion of this Honorable Court, [fol. 770] it is stated that Sgt. Morales "took appellant to the police station *for questioning* about his wife's death." The evidence shows that Marvin Clewis was placed *under arrest* by Morales within an hour after arrival at the police station.

This is a very serious question, and it cannot be ignored in an objective determination of this appellant's Constitutional rights.

When the tests applied in the *Beck* case and in the *Mapp* case are applied to these facts, the question for determination must be: "Whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Clewis." This is the test which was applied in *Wong-Sun* vs. *United States,* supra, and will be the test the Supreme Court of the United States will apply to these facts.

Morales testified that he could not have secured a warrant for the arrest of this appellant at the time he did in fact place him under arrest. The sheriff's office knew that no warrant would have issued, and made no attempt to hold Clewis when he voluntarily came to the sheriff's office to answer their questions. There can be no doubt under our law but that appellant would have been released had he been taken before a magistrate and given an examining trial at any time prior to his confession.

It was this first confession which broke appellant. The fact of illegal arrest was called to the attention of the trial court in Defendant's Motion to Exclude and Suppress State's Confessions which was overruled before any evidence was taken and again overruled after the evidence was presented on the Motion. This fact was again called to the attention of the trial court in Defendant's Motion for Instructed Verdict and, of course, in Defendant's Motion for New Trial. It cannot be over-emphasized that this appellant was in the effective custody of the police from the time he left the home of Elizabeth Johnson at 6:00 A.M. on Sun-[fol. 771] day morning, and that he was placed under arrest when he arrived at the police station and when his belongings were taken from him no more than an hour later.

These facts are undisputed. The Court does not discuss this situation in its opinion, and we submit that the situation requires that the Court rule on the point of appellant's illegal and unlawful arrest and detention by the police.

III

This Honorable Court is in Error in its Holding that Appellant's Rights under the Fourteenth Amendment to the Constitution of the United States and the Protection Afforded by the due Process Clause Were not violated by the failure of the Arresting Officers, after Arresting him Without a Warrant, to take him Immediately Before a Magistrate as Required by the Laws of this State, and that a Confession taken after such failure is Admissible into Evidence.

Appellant was held for two full days before being taken before a magistrate *(S.F. 651-652.)* As we have previously

stated, there were no legal grounds upon which this appellant could be held in custody prior to that time, and an examining trial would have discharged this appellant at any time prior to the time when the first confession was obtained. We would call the attention of the Court again to the facts in *Ward* vs. *Texas, 316 U.S. 547, 62* S.Ct. *1139, 86 L.Ed. 1663* which were in many respects very similar to the facts in this case. The Supreme Court of the United States has been very definite in its requirement that the accused be taken immediately before a magistrate, as is the law of Texas, which imposes a like requirement. The expiration of two days is too much according to those decisions, and amounts in itself to coercion and duress. This principle is so well settled as a fundamental Constitutional right, that we have not wanted to burden this Court with the [fol. 772] recitation of the numerous authorities by which this principle is established. We stand on our original point, and again submit to the Court that reversal of this case is required because of the falure of the police officers to take this appellant immediately before a magistrate. We also submit that any distinction which attempts to make the third confession admissible because he had prior to that time been taken before a magistrate, is entirely too tenuous and will be rejected by the Supreme Court of the United States in determining the admissibility of the third confession.

IV

This Honorable Court is in Error in its Holding that the Belated Written Findings of the Trial Court Concerning the Voluntariness of the Confession Introduced into Evidence was Properly Before the Court for its Consideration in Passing Upon the Admissibility of the Written Confession, for the Reason that Neither the Trial Judge nor the Jury Made any Specific Finding at the Trial on the Issue of Voluntariness of the Confession Introduced in Evidence.

The acceptance by this Honorable Court of the trial court's findings is, as we have pointed out in our original brief, contrary to all the prior decisions of this Court relating to the entry of any findings or orders while a case is on appeal. We have cited the recent case of *Mobley* vs. *State, 366 SW2d 558-559,* and two other recent cases, *Col-*

bert vs. *State, 331 SW2d 328* and *Stickney* vs. *State, 336 SW2d 133.* This Court does not distinguish these cases from the present situation.

Certainly, permitting the trial judge to file written findings dated after the case has been submitted on briefs to the Appellate Court, is a unique concept. This appellant was deprived of his rights to objection at the time of trial; he was not permitted to have the benefit of the trial [fol. 773] court's reasoning at that time; and he was precluded from arguing the point on appeal. This is a fundamental deprivation of the rights of any defendant accused of crime, and we submit that *Jackson* vs. *Denno, 84 S.Ct. 1774* still requires that this conviction be reversed because of the failure of the trial court to do what the Supreme Court of the United States has said he must do in a case like this one.

This Court also failed to discuss in its opinion the failure of the trial court to grant the special requested instructions of defendant which would have required the jury to make a specific finding concerning the voluntariness of the confession introduced into evidence. Special Requested Instruction No. 2 would have instructed the jury that they must be governed by the law of circumstantial evidence, in the event they found the confession to be involuntary. Had this been done, then there would be a method of determining how the jury resolved these matters. This was error, and would have cured any objection which appellant could now urge under the doctrine of *Jackson* vs. *Denno,* supra.

This Court recites in its opinion that there was certain testimony that appellant had threatened to kill the deceased and had choked her several days prior to her disappearance. That testimony was contradicting. The uncontradicted evidence shows, however, that neither the person who so testified nor any of the deceased's relatives considered Marvin Clewis a suspect at any time prior to his arrest. Neither did the officers consider him to be a suspect. The truth of the matter is that there is no evidence in this record which would produce a conviction of this appellant other than his confession.

V

This Honorable Court is in Error in its Holding that Appellant's Rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were [fol. 774] not Violated by the Admission into Evidence of a Confession taken at a time When he Was not Represented by Counsel.

This Honorable Court distinguishes the right of this appellant to counsel from that of other defendants accused of crime on the basis that appellant made no request to consult with counsel at the time he made the confession, whereas the defendant in *Escobedo* vs. *Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977,* asked to consult with counsel and that request was denied. We have submitted, in our original brief, the additional authorities of *Massiah* vs. *United States, 377 U.S. 201, 84 S.Ct. 1199, Carnley* vs. *Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70,* and other cases. We quote again from the opinion of Mr. Justice Brennan for the majority in *Carnley* vs. *Cochran,* supra:

> "The assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment. . . *It is settled that where the assistance of counsel is a Constitutional requisite, the right to furnish counsel does not depend on a request. . . We have held that when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished whether or not the accused requested appointment of counsel.*"

As Mr. Justice White pointed out in his dissenting opinion in the *Escobedo* case, supra:

> "It would be naive to think that the new Constitutional right announced will depend on whether the accused has retained his own counsel . . . or has asked to consult with counsel in the course of interrogation . . . *At the very least the Court holds that once the accused becomes a suspect and; presumably, is arrested, any admission made to the police there-*

after is inadmissible unless the accused has waived his right to counsel."

We have also cited to the Court the language in *People* vs. *Dorado, 33 Law Week 2122,* a California case, which sensibly applies the *Escobedo* holding to facts similar to these.

In connection with this point, and if this Honorable Court persists in holding that only the events transpiring im- [fol. 775] mediately before the taking of the third confession are pertinent, we would call the attention of the Court again to the testimony of officer Howell *(S. F. 387)* that this defendant had said that he "would like to talk to someone." The officer testified that he placed a long distance telephone call to appellant's employer, but that he was not in. Nevertheless, the statement was taken without this appellant talking to anyone after he had made a request "to talk to someone." We, therefore, would submit to the Court that this in itself is a violation of the Constitutional rights of this appellant. The question is not, and cannot be, whether a defendant specifically requests counsel. The defendant, in *Haynes* vs. *Washington,* supra, was not permitted to make a telephone call to his wife, and the Supreme Court of the United States reversed his conviction. In this case, appellant did ask to talk to someone, but the officers did not wait until he had the opportunity to do so; instead, they called the district attorney down, and appellant testified:

> "They went and got Mr. Mims, and when they went and got him, why, I was scared because I could see it looked like the same thing happening all over again, that three or four days of abusing, and I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement because I had already made two statements and I didn't figure it made any difference. I had signed two."

Since the submission of our briefs and argument of this case, the Supreme Court has handed down its opinion in *Pointer* vs. *Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923.* While the Supreme Court decided that case on the basis of the Constitutional right of cross-examination, the Court

reserved the question as to whether or not the Texas preliminary hearing is so critical to the defendant as to call for appointment of counsel at that stage. We have covered this question rather thoroughly in our original briefs, and need not go into it further here. The opinion of this Court did not dispose of this issue, and devoted no attention whatever to the right of appellant to counsel at that hearing. We submit that in these circumstances, appellant was entitled to counsel, and that if he had been [fol. 776] afforded his right to counsel, the charge against him would have been dismissed for lack of evidence.

VI

This Court is in Error in its Holding that the Corpus Delicti was Established and that the Confession Introduced by the State was Sufficient to Corroborate Appellant's Confession.

This Honorable Court rather summarily disposes of our contentions and authorities with reference to the corpus delicti and the corroboration of the confession introduced by the State. We must again call to the Court's attention the rule that the confession of an accused is available to aid the proof of the corpus delicti *when there is evidence of death by a criminal agency. Johnson* vs. *State,* (Crim. App. 1923) *249 SW 1056.* In its opinion this Court says that, "The other surrounding facts and circumstances, when taken in connection with the confession, are sufficient to establish the corpus delicti." We must inquire: What facts and circumstances?

There is no evidence that the deceased died, if she did, by means of a criminal agency. This record can be searched from beginning to end, and there is a total absence of such proof.

The Court also fails to consider the uncontradicted independent evidence set forth at great length in our original brief (pages 78-81). On the other hand, there is no proof of the kind required by Articles 1201 and 1202 of Vernon's Annotated Texas Penal Code. There is absolutely no evidence, apart from the confession introduced by the State, to establish the corpus delicti or to show that the destruction of life was completed by any act, agency, procurement

or omission of the accused: There is no evidence here of any criminal agency, nor is there any evidence connecting defendant with the use of any criminal agency or establishing that he was any where near the deceased at any material time.

[fol. 777] The testimony of the State's witnesses is conclusive: There is no way to determine how Dorothy Mae Clewis died. There is even considerable doubt as to the identification of the remains as being the remains of Dorothy Mae Clewis. There is also very significant testimony by officer Morales that another colored woman was missing at the time these remains were found and was still missing at the time of trial. These remains could have been the remains of that person or, if they were in fact the remains of Dorothy Mae Clewis, she could have died a natural death insofar a sthis record is concerned.

This Court has not detailed what "surrounding facts and circumstances" are sufficient to establish the corpus delicti or to corroborate appellant's confession. We submit that there are none.

VII

Based upon the errors hereinabove set out, we submit that this Court should grant this Motion for Rehearing and to reverse this case and remand same for a new trial with appropriate instructions. Appellant—an uneducated Negro man who had never before had any experience with the law and had never before been in custody—has been tried and convicted for an offense which he did not commit. This is not a case where the Court is urged to reverse this conviction on the basis of some "technical" error in the trial. Neither is it a case where the Court is asked to disregard any other evidence which would convict this defendant of the crime of murder. Apart from his confession, there is no evidence upon which this appellant could be convicted. Appellant's mother-in-law and stepdaughter, who were the mother and daughter of the deceased, at no time suspected Marvin Clewis of any implication in the disappearance of his wife. Nothing pointed to his guilt. He was convicted by statements from his own mouth, which were coerced in violation of his rights under the Constitution of the United States of America. These confessions must all [fol. 778] be taken together, and the presumption must

obtain that if the first confession was coerced—and it unquestionably was—then the coercive influence carried over to any subsequent confessions. That this is so defies all argument.

The uncontradicted evidence shows that other persons had threatened the life of Dorothy Mae Clewis, and that she was leaving town because she had taken money from a white man. A colored woman had called her employer on the very afternoon of her disappearance, threatening to kill her.

Marvin Clewis did not "run". He continued at his same job, and came voluntarily when the officers said they wanted to talk to him. The tactics used by officer Morales and the other police officers following his illegal arrest and during his illegal detention were unquestionably coercive. None of the confessions which the State obtained from Marvin Clewis can be said in these facts and circumstances to be the product of a rational intellect and a free will. Instead, they were taken at a time when his will was overborne. The multitude of cases which we have recited explicitly bars the use of a confession obtained in such circumstances. What is uncontradicted in the record is certainly more than sufficient to establish the coercion.

Apart from this question, the questions of corroboration of that confession; of identification of the deceased; of establishment of the corpus delicti and of the use of any criminal agency by this appellant; the fact that he was not afforded counsel; and that his requests to talk to someone were not complied with—all of these things also require reversal of the case.

[fol. 779] Wherefore, appellant prays that his Motion for Rehearing be granted and that the trial court's judgment of conviction be reversed and remanded with appropriate instructions.

Legg, Saxe & Backin, P.O. Box 107, Midland, Texas,
By: /s/ Reagan H. Legg, Attorneys for Appellant.

Certificate of Service (omitted in printing.)

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 780] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 37,483

MARVIN CLEWIS, Appellant,

v.

THE STATE OF TEXAS, Appellee

Appeal from Midland County

OPINION ON APPELLANT'S MOTION FOR REHEARING —November 10, 1965

In an exhaustive brief on motion for rehearing appellant challenges the soundness of our original opinion on several grounds. Appellant challenges the authority of this Court to consider the belated finding of the trial court on the issue of the voluntariness of the confession. This Court has, since the rendition of the opinion of the Supreme Court of the United States in Henry v. Mississippi, 379 U.S. 443, 13 L ed 2d 408, 85 S. Ct. 564, (January 18, 1965), adopted the practice which was approved in that case and has accepted such findings in four other cases.

Collins v. Beto, 348 F. 2d 823, (June 18, 1965), was not distinguished from the case at bar in our original opinion. We shall do so now.

1. In Collins neither this Court nor the United States Court of Appeals had before them a Jackson v. Denno finding by the trial court on the question of the voluntary nature of confession. In the case at bar we do have such a finding.

2. As we construe the opinion in Collins it is not authority for the holding that Wong Sun v. U.S., 371 U.S. 471, 9 L ed 2d 441, 83 S. Ct. 407, is applicable to state court trials.

3. After arrest, Collins was moved to an out of town jail in Humble where he was booked for vagrancy under the name of Joe Smith, although the officers admitted that they had no basis for such charge and knew his name was not Joe Smith. In the case at bar no groundless charge was filed against appellant under another name, nor was he incarcerated in any out of city jail.

4. Both statements made by Collins were reduced to writing prior to his being taken before a magistrate. In the case at bar the confession which was introduced was taken from this appellant after he had been carried before a magistrate where bond had been set.

5. Collins had seen no relatives or friends prior to making [fol. 781] either of his two confessions. This appellant had been visited in jail by friends and members of his family and had spoken to a lawyer before he made the confession which was introduced.

6. Collins was credited with an I.Q. in the lower ten percent of the population and with the mentality of a child. This appellant had succeeded exceptionally well as foreman of a pipeline crew according to the testimony of his employers, which would be indicative of a thorough awareness of what he was doing.

7. Collins' two confessions followed a long period of questioning by teams of officers. Appellant had not been questioned at all for three days before the short period of interrogation which preceded the taking of the statement which was introduced in evidence. There was no evidence of undue pressure being applied to appellant at this time.

Originally we did not discuss eo nomine the question of whether the corpus delicti had been established. A most workable definition of the elements of the corpus delicti of a murder case in Texas may be found in Smith v. Texas, 329 F. 2d 498. We find such elements to have been established in the case at bar.

This case has received careful consideration by the members of this Court, and we remain convinced that it was properly decided originally.

Appellant's motion for rehearing is overruled.

Morrison, Judge.

(Delivered November 10, 1965)

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 782] [File endorsement omitted.]

[fol. 783] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Cause No. 37,483

[Title omitted]

APPELLANT'S SECOND MOTION FOR REHEARING—filed November 24, 1965

To the Honorable Court of Criminal Appeals for the State of Texas:

Comes Now Marvin Clewis, appellant in the above entitled and numbered cause wherein this Honorable Court did on October 4, 1965, render and deliver its opinion affirming his conviction for the offense of murder with malice, and did on November 10, 1965, render and deliver its opinion denying appellant's Motion for Rehearing herein, and files this his Second Motion for Rehearing, and would show and represent to the Court that this Court has erred and that the judgment of the District Court of Midland County should be reversed and the prior opinions of this Court withdrawn, for and upon the following grounds and reasons, to-wit:

I

This Honorable Court is in Error in its Opinion Overruling Appellant's Motion for Rehearing Wherein this Court held that a Finding by the Trial Court on the Question of Voluntariness of the Confession Distinguishes This Case from *Collins* vs. *Beto, 348 Fed. 2d 823* (5th C.C.A., June 18, 1965.)

While this appellant still insists that this Honorable Court is without authority to accept the findings of the trial [fol. 784] court filed while this case was pending on appeal, and on the day before the case was set for submission on appeal, we would further call the attention of the Court to the following language of Judge Friendly in *Collins:*

> "Chief Judge Tuttle has clearly set out the facts *based upon the concessions of both sides and the findings of the District Judge.* If we disregard the claimed beat-

> ing as we must, no single circumstance standing alone would characterize the statements as involuntary; but *when all the elements are taken together,* it is not possible for me to feel that Collins' confessions were 'the expression of free choice.' *Watts* vs. *Indiana, 388 U.S. 49, 53, 69 S. Ct. 1347, 93 L.Ed. 1801* (1949)"

It is interesting to note that nowhere in the opinion is *Jackson* vs. *Denno, 84 S. Ct. 1774,* cited. Certainly this issue would have been raised, had there been no findings by the trial court.

Whether Judge Friendly, in the language quoted above, is referring to the trial court or the federal district judge when he uses the term "District Judge" is debatable. However, there is no doubt about the meaning of the remainder of the language.

It has long been the rule established by the Supreme Court of the United States that appellate courts must look to "all the facts and circumstances" in determining the issue of voluntariness of a confession. It has never been indicated in any of the opinions of the Supreme Court of the United States previously cited in our briefs that a finding of the trial judge precludes an examination of all the facts and circumstances or excuses a failure to make such examination. The written findings of the trial court are simply now made a requisite in the trial procedure, but the Supreme Court does not look to such findings as determinative of this question, nor has it ever indicated that such findings can be so regarded by any court of appeal.

Certainly, the judges in *Collins* did go into and examine all the facts and circumstances surrounding the confession itself. Chief Judge Tuttle detailed those facts at great [fol. 785] length and also went on to say that *even if the confessions were determined to be voluntary,* they would be excluded by the Rule in *Wong Sun* vs. *United States* (S. Ct. 1963) *371 U.S. 471, 83 S. Ct. 407, 9 L.Ed. 2d 441.* We shall discuss *Wong Sun* below, but we submit that the reasoning of this Court is contrary to that of both judges in *Collins,* when this Court holds that the finding of the trial court is to be considered as precluding an independent examination of all the facts and circumstances surrounding the confession.

II

This Honorable Court is in Error in its Opinion Overruling Appellant's Motion for Rehearing Wherein this Court held that *Wong Sun* vs. *United States* (S. Ct. 1963) *3471 U.S. 471, 83 S. Ct. 407, 9 L.Ed. 2d 441,* is not Applicable to State Court Trials and that *Collins* vs. *Beto, 348 Fed. 2d 823,* (5th C.C.A., June 18, 1965) is not Authority for the Application of the Exclusionary rule in *Wong Sun* to such Trials.

This holding by this Honorable Court is in direct conflict with the language in the opinions of both Chief Judge Tuttle and Judge Friendly in *Collins.* We would call the Court's attention, first, to the opinion of Chief Judge Tuttle who, after citing the opinion of the Federal District Judge, said:

> "*Wong Sun's* exclusionary rule is *equally applicable in both State and Federal courts.*"
> "Thus the necessary predicate for the application of the exclusionary rule in *Wong Sun* is indisputably present in thise case."
> "So far as the obligation falls to the lot of the federal courts to play a part they must not retreat from the duty of using the only means at their command to bring to an end unlawful arrests and other violations of fundamental rights. *This means is to set aside convictions, whether they be by state or federal courts,* that are based upon such denials on the part of public officials of the constitutional rights of the individual.
> [fol. 786] "In this case the State officers acted without regard for the law or for the rights of their prisoner. Consequently, his present custody is illegal, and relief by habeas corpus should be granted."

Judge Friendly's opinion was equally definite on this point:

> "I perceive no basis for supposing that, having equated verbal with real evidence obtained in violation of the Fourth Amendment with respect to exclusion in federal trials * * * the court that had decided *Mapp* vs. *Ohio, 367 U.S. 43, 81 S. Ct. 1684, 6 L.Ed. 2d 1081* (1961), only

two years earlier would distinguish the two sorts of evidence with respect to the necessity for exclusion in state trials."

And again:

"The Fourth Amendment protects against improper seizure of the person as fully as against unreasonable breaking into the close * * * and nothing in the Supreme Court's language would warrant a view that the Fourteenth Amendment 'absorbs' the Fourth less in one respect than in the other."

Judge Friendly then concludes:

"I thus follow Chief Judge Tuttle on the general proposition that *Wong-Sun* prohibits the introduction in a state criminal trial of a confession that is the result of an arrest violating the Fourth Amendment, just as *Mapp* prohibits the reception of an object obtained through an unconstitutional search."

We fail to understand how either of these Judges could have been more definite in stating that *Wong Sun* vs. *United States* is applicable to state court trials. We had made the same argument in our original brief long before *Collins* vs. *Beto* was decided, and appellant submits that there really can be no question that *Collins* is authority for this proposition.

Such being the case, the exclusionary rule of *Won Sun* vs. *United States* requires that this case be reversed because of the admission into evidence of State's Exhibit No. 13.

[fol. 787] III

This Honorable Court is in Error in Attempting to Distinguish *Collins* vs. *Beto* from the case at Bar on the Ground of the Circumstances of Arrest and Incarceration.

Both Judges in *Collins* make much of the fact that the defendant in that case was arrested by officers who knew that no warrant could have issued for his arrest. They did obtain a warrant under a false name and failed to take the defendant before a magistrate, but no warrant could legally

have issued for him and the officers knew it. As Judge Friendly wrote:

> "The law relating to arrest and detention does not always provide bright lines, and minor errors by the police are hardly to be avoided. But when the police operate in calculated and substantial disregard of the applicable rules, they cannot expect the benefit of any doubts as to undue pressure in a truly close case."

It is true that the police did not swear to a "false charge" and have a warrant issued under a "false name." They did not even go that far in this case in attempting to show some sort of surface compliance with the constitutional rights of this defendant. *No* charge was filed, and *no* warrant was issued. The violation in this case is even more flagrant than in *Collins*.

While we have done so on many occasions, we again must call the attention of this Court to the testimony of officer Morales (S.F. 272) where he testified that he knew he did not have sufficient grounds to get a warrant. He also testified that he had not taken any part in the investigation of the case, had not been asked to assist in the investigation, and that the case was not in his jurisdiction as a city police officer. (S.F. 636) He was not taken before a magistrate until after the first confession was signed. Even then, and after he had been taken before a magistrate and a warrant issued, this officer made no attempt to comply with the [fol. 788] law which required that he be delivered into the custody of the sheriff. (S.F. 651, 658-659)

We agree that these facts do not coincide with those in *Collins*. They are more flagrant violations of the law than were present in the *Collins* case. If those facts called for reversal and for the application of the exclusionary rule of *Wong Sun* vs. *United States*, supra, then certainly these facts require that such rule be applied.

We cited in our original brief (page 70) the case of *Ward* vs. *Texas, 316 U.S. 547, 62 S. Ct. 1139, 86 L.Ed. 1663.* The facts in that case were very similar to these and the Supreme Court of the United States reversed that conviction. Ward had also been released after his first detention and was arrested by an officer without authority and without a warrant who did not take hime before a magistrate.

This Court is also in error when it says that "nor was he incarcerated in any out-of-city jail." The facts in this case are undisputed that this defendant was incarcerated in two places: one in the Department of Public Safety building located out of the city limits of Midland and, secondly, in the jail in Borger, Texas. There can be no question about these facts and they are admitted by the officers.

IV

We have argued at great length concerning the correctness of the opinion of this Court concerning the other distinctions attempted to be drawn in the opinion on our Motion for Rehearing. We have pointed out that *Wong Sun* vs. *United States* makes this confession void because of the illegal arrest, regardless of the fact that he had been carried before a magistrate prior to the time that this particular confession was taken. We have also cited to the Court *Culombe* vs. *Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037*, and other cases where the Court refused to make any distinction between confessions taken at one time [fol. 789] and at another, where coercion was used in order to obtain the first such confession. We would also point out the interesting language contained in Chief Judge Tuttle's opinion where he said:

> "The taint of Collins' unlawful detention could not have been purged by the fact that he might have been warned, *after he had completed his oral statement*, and while officer Baker was preparing to commit this to writing, that he need make no statement . . . (citing cases) The reaffirmation of Collins' oral statement could not be considered independent of that statement."

If the Court will reread the testimony of officer Gene Howell (*S.F. 382-383*) it will become apparent that Clewis confessed orally before he had been warned of his right to keep silent, in connection with the confession introduced in evidence. The only testimony is that he was warned of his right to keep silent just before the written statement was taken. We would also cite to the Court the opinion in *Culombe vs. Connecticut*, supra, which requires a warning at the beginning of an interrogation.

In any event, the state wholly failed to prove that the same forces which induced this defendant to make the first two confessions were not present at the time the third was taken. He had been told that he might be given additional lie detector tests, the district attorney had been summoned, and this appellant could see the pattern of events beginning to take shape "all over again." The distinction which the Court attempts to make by reason of the fact that he had been taken before a magistrate in the intervening period is too tenuous. He was subjected to long questioning after that time, and never at any time did a lawyer represent him. The fact that the lawyer would not have warned him against making the third statement is understandable, since he had already signed two.

We do not believe that our failure to introduce psychiatric testimony concerning the I.Q. of this defendant has [fol. 790] anything to do with his ability to withstand the coercive influences practiced upon him. He had never finished elementary school, had never been in trouble with the officers, and could not be expected to understand or comprehend what his constitutional rights were. The protection of those rights is the sole reason for the long line of decisions cited by us in our briefs.

There was evidence of pressure being applied at the time of the third confession, in that the appellant could easily see what was in store for him if he again continued to resist the entreaties of the officers. As he testified, the other officers had told him they would not mistreat him, but they did, and he could hardly be expected to place much reliance upon the promises of the deputies in view of his past experience.

V

We have carefully read and considered the opinion in *Smith* vs. *Texas, 329 Fed. 2d 498,* and believe that Judge Brewster's opinion merely bolsters our argument that the corpus delicti has not been established here. ***There is no proof that an offense was committed, aside from the appellant's own statement.*** The statement in *Smith* was corroborated by independent evidence in many, many respects. There was a definite identifiable body in that case; here, the identification rests solely on a set of teeth identified by

a colored dentist in Waco who had lost his records and had seen Dorothy Mae Clewis only three times more than 13 years before his testimony. This same dentist testified that he saw 3,000 patients per year. By any standard, this testimony cannot be sufficient to establish identification of the teeth.

More important, however, is the fact that there is absolutely no independent evidence anywhere in this record that Dorothy Mae Clewis died, if she did, "by the criminal act or agency of another." We submit that there is also no evidence "that the accused is connected with that criminal act or agency." We would refer the Court to the [fol. 791] testimony of deputy Guy Fletcher *(S.F. 36)*; deputy E. H. Kirksey *(S.F. 52)* and Dr. Martha Madsen *(S.F. 402, 403)*, who were the only witnesses who testified as to the cause of death. Each of these witnesses testified that there was no possible way to determine what the cause of death was, much less whether or not that cause was criminal. There is certainly no evidence either before or after the fact to indicate that Marvin Clewis had any motive for such a murder.

VI

We again insist also that the Court erred in its failure to give the charges requested, and in its charge to the jury on the issue of murder with malice. If this evidence, including the confession, established anything, it was no more than murder without malice, and the jury should have been so charged.

We again also urge for the Court's consideration our contention that the Court erred in failing to require the state to produce the first two confessions after we had offered our motion in writing that the state be compelled to do so. The Court has not written on this point, and we believe it to be very significant, in that no defendant can be expected to properly defend a case where his constitutional rights are involved if all the facts surrounding a confession introduced in evidence are not made available to him. We still do not know, nor did the jury, what was contained in those first two statements, and this could have been and in all probability was very material in determining the issue of coercion.

Wherefore, appellant prays that this Motion for Rehearing be granted, and that the trial court's conviction be reversed and remanded with appropriate instructions.

Legg, Saxe & Baskin, P.O. Box 107, Midland, Texas,
By: /s/ Reagan H. Legg, Attorneys for Appellant.

[fol. 792] Certificate of Service (omitted in printing).

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 793] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

No. 37,483

MARVIN CLEWIS, Appellant,

v.

THE STATE OF TEXAS, Appellee

Appeal from Midland County

AMENDED OPINION ON APPELLANT'S MOTION FOR REHEARING —January 5, 1966

In an exhaustive brief on motion for rehearing appellant challenges the soundness of our original opinion on several grounds. Appellant challenges the authority of this Court to consider the belated finding of the trial court on the issue of the voluntariness of the confession. This Court has, since the rendition of the opinion of the Supreme Court of the United States in Henry v. Mississippi, 379 U.S. 443, 13 L ed 408, 85 S. Ct. 564, (January 18, 1965), adopted the practice which was approved in that case and has accepted such findings in four other cases.

Collins v. Beto, 348 F. 2d 823, (June 18, 1965), was not distinguished from the case at bar in our original opinion. We shall do so now.

1. In Collins neither this Court nor the United States Court of Appeals had before them a Jackson v. Denno finding by the trial court on the question of the voluntary nature of confession. In the case at bar we do have such a finding.

2. The decision of the majority in Collins was based on the involuntariness of Collins' confession as a matter of law. The resolution of Collins' claims with regard to Wong Sun v. U.S., 371 U.S. 471, L ed 2d 441, 83 S. Ct. 407, was attempted only by Chief Judge Tuttle, whose opinion also found the confession to be involuntary. Viewed in this light, we do not find Collins determinative of the appellant's claim under the exclusionary rule of Wong Sun.

3. After arrest, Collins was moved to an out of town jail in Humble where he was booked for vagrancy under the name of Joe Smith, although the officers admitted that they had no basis for such charge and knew his name was not Joe Smith. In the case at bar no groundless charge was filed against appellant under another name, nor was he incarcerated in any out of city jail with the exception of a brief stay of less than one hour in the police station at Borger on the day that his truck was searched plus a visit to the Midland Department of Public Safety where he was given a polygraph test.

4. Both statements made by Collins were reduced to writing prior to his being taken before a magistrate. In the case at bar the confession which was introduced was taken from this appellant after he had been carried before a magistrate where bond had been set.

5. Collins had seen no relatives or friends prior to making [fol. 794] either of his two confessions. This appellant had been visited in jail by friends and members of his family and had spoken to a lawyer before he made the confession which was introduced.

6. Collins was credited with an I.Q. in the lower ten percent of the population and with the mentality of a child. This appellant had succeeded exceptionally well as foreman of a pipeline crew according to the testimony of his employers, which would be indicative of a thorough awareness of what he was doing.

7. Collins' two confessions followed a long period of questioning by teams of officers. Appellant had not been questioned at all for three days before the short period of interrogation which preceded the taking of the statement which was introduced in evidence. There was no evidence of undue pressure being applied to appellant at this time.

Originally we did not discuss eo nomine the question of whether the corpus delicti had been established. A most workable definition of the elements of the corpus delicti of a murder case in Texas may be found in Smith v. Texas, 329 F. 2d 498. We find such elements to have been established in the case at bar.

This case has received careful consideration by the mem-

bers of this Court, and we remain convinced that it was properly decided originally.

Appellant's motion for rehearing is overruled.

Morrison, Judge.

(Delivered January 5, 1966)

[fol. 795] IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Cause No. 37,483

[Title omitted]

MOTION FOR STAY OF MANDATE

To the Honorable Court of Criminal Appeals of Texas:

Comes Now Marvin Clewis, Appellant in the above entitled and numbered cause, and files this his Motion for Stay of Mandate in the Honorable Court of Criminal Appeals of Texas and would respectfully show the Court:

1

Appellant was charged by indictment with the offense of murder with malice; he was tried before a jury; his punishment was assessed at a term of twenty-five (25) years in the penitentiary; the case was appealed to this Honorable Court and, on the 4th day of October, 1965, the conviction in the trial court was affirmed.

Appellant timely filed his Motion for Rehearing in this cause and, on November 10, 1965, this Honorable Court overruled such Motion. Thereafter, Appellant filed his Second Motion for Rehearing on November 24, 1965, and on January 5, 1966, Appellant's Second Motion for Rehearing was overruled. Unless a third Motion for Rehearing is filed on or before January 20, 1966, Appellant is advised that mandate will issue within a few days thereafter.

2

Appellant contended on appeal, as he had in the trial court, that the confession introduced in evidence against [fol. 796] him was made at a time when his will was overborne and, therefore, was an involuntary confession; that he was not properly warned of his rights under the Constitution of the United States; that he was arrested without probable cause and was not immediately taken before a magistrate; and that all of the above were violations of his

rights as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. Appellant further contended on appeal that he was not afforded counsel as guaranteed to him by the Sixth Amendment to the Constitution of the United States.

In addition to the above contentions, Appellant urged this Court to reverse this case because of the failure of the prosecution to prove the corpus delicti and its failure to corroborate the confession introduced in evidence; because neither the trial judge nor the jury made any specific findings on the issue of voluntariness of the confession introduced in evidence; because the Court erred in admitting into evidence incriminating oral statements made by him while in custody and unwarned; because the Court erred in overruling Appellant's Motion to require the state to produce all confessions which it had; and because of the failure of the trial court to submit certain Requested Special Instructions to the jury.

Appellant has cited to the Court in rather voluminous briefs all of the decisions of the Supreme Court of the United States bearing upon Appellant's constitutional rights and has demonstrated that his rights were violated under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Appellant has also cited to the Court the opinion of the Fifth Circuit Court of Appeals in the case of *Collins* vs. *Beto, 348 Fed. 2d 823,* which holds without question that the exclusionary rule in *Wong Sun* vs. *United States, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407,* applies to state court trials. This Honorable Court has attempted to distinguish that decision on factual [fol. 797] grounds, which, we submit, is not justified in view of the opinions of Chief Justice Tuttle and Judge Friendly.

Up to this point, this Honorable Court has refused to follow the authorities, both state and federal, relied upon by Appellant herein. It therefore will become necessary for Appellant to seek aid in the Supreme Court of the United States or by Writ of Habeas Corpus in a United States District Court in Texas.

3

Appellant will forthwith proceed with either a Petition for Writ of Certiorari in the Supreme Court of the United States, or will file a Writ of Habeas Corpus in an appropriate United States District Court which has jurisdiction over Appellant, in order that this Honorable Court's determination of Appellant's constitutional rights may be reviewed. If this Honorable Court does not stay the mandate in this case, Appellant will be forced and compelled to transfer to the penitentiary of the State of Texas and to begin serving a sentence or a portion thereof which he very seriously and earnestly contends is in violation of his rights as guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

4

Appellant would represent and show to this Honorable Court that if this Motion for Stay of Mandate is granted, he will forthwith prosecute one of the aforesaid remedies with diligence and will file the same within the time prescribed by law or such other reasonable time as this Honorable Court may see fit to stay such mandate. In the circumstances, Appellant moves this Honorable Court to grant him ninety (90) days in which to prepare and file his petition for Writ of Certiorari to the Supreme Court of the United States. In the alternative, Appellant prays this Honorable Court to stay the issuance of the mandate in this [fol. 798] case for a period of thirty (30) days in order to allow Appellant sufficient opportunity to secure a stay of mandate from a Justice of the Supreme Court of the United States.

5

This application is not made for purposes of delay, nor to defeat the ends of justice or to circumvent the law of this state, but only in order that Appellant may realize the full benefit of the guarantees of the Constitution of the United States under the Fourth, Fifth, Sixth and Fourteenth Amendments to such Constitution.

Wherefore, Appellant prays the Court to entertain and grant this Motion for Stay of Mandate pending the filing

and prosecution of Appellant's Petition for Writ of Certiorari to the Supreme Court of the United States for a period of ninety (90 days or, in the alternative, for a period of thirty (30) days from January 20, 1966.

Respectfully submitted, /s/ Marvin Clewis, Appellant, Legg, Saxe & Baskin, P.O. Box 107, 1000 Midland Savings Building, Midland, Texas, By: /s/ Reagan H. Legg, Attorneys for Appellant.

[fol. 799] *Duly sworn to by Marvin Clewis and Reagan H. Legg jurat omitted in printing.*

Certificate of Service (omitted in printing).

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 800] IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

No. 37,483

MARVIN CLEWIS, Appellant,

vs.

THE STATE OF TEXAS, Appellee

ORDER—January 18, 1966

The application of Marvin Clewis, for a stay of issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the Appellant for a period of ninety (90) days from this date in order that he may apply to the Supreme Court of the United States for a Writ of Certiorari.

And the Clerk is further directed that in the event the Writ of Certiorari is granted by the Supreme Court of the United States that the issuance of the mandate be delayed until final action by that Court upon the matter.

This *18th* day of January, A.D. 1966.

W. T. McDonald, Presiding Judge, Court of Criminal Appeals.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 801] CLERK'S OFFICE IN THE COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,483 styled:

MARVIN CLEWIS, Appellant,

v.

THE STATE OF TEXAS, Appellee

Judgment of the 142nd Judicial District Court of Midland County, Texas, was affirmed by this Court on October 4, 1965; Appellant's Motion for Rehearing was overruled November 10, 1965; Appellant's Second Motion for Rehearing was overruled, without written opinion, January 5, 1966; and order staying mandate and all other proceedings, to permit appellant to seek a writ of certiorari from the Supreme Court of the United States, was filed January 18, 1966.

Therefore, with the overruling of Appellant's Second Motion for rehearing, this cause was disposed of by this Court on January 5, 1966, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the Court of last resort in Texas for criminal cases and said judgment has now become final on the docket of this Court.

Witness my hand and Seal of said Court, at office, in Austin, Texas, this 21st day of February, A.D., 1966.

Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas.

[fol. 802] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 73 Misc.

MARVIN CLEWIS, Petitioner,

v.

TEXAS

ORDER ALLOWING CERTIORARI—October 10, 1966

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 648 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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Attorney for Petitioner

LEGG, SAXE & BASKIN
Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

Opinions Below

The Court of Criminal Appeals of Texas delivered three opinions in this case, none of which appear in the official Reporters. The original opinion was dated October 4, 1965, and appears in the Record at pages 441-445. That Court

delivered another opinion on Appellant's Motion for Rehearing, which was delivered on November 10, 1965 (R. 461-462), and delivered another opinion, called an amended opinion on Appellant's Motion for Rehearing, on January 5, 1966 (R. 472-474). We have been unable to determine why these opinions were withheld from publication.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and Rule 19 (1), Revised Rules of the Supreme Court of the United States. The rights, privileges and immunities set out by and granted to petitioner by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States have been denied.

Questions Presented

Was there a denial of due process of law under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States where a confession of the accused was admitted into evidence in a state criminal proceeding and

(1) That confession was the third in a series of confessions signed after prolonged interrogation and detention, during which time petitioner did not have adequate food or proper rest, was sick and frightened?

(2) The accused was not warned of his right to keep silent or apprised of his right to counsel prior to signing any of the statements?

(3) When, after petitioner had requested that he be allowed to "talk to someone" before signing a confession, the officers summoned the district attorney, who was the only person petitioner was allowed to talk to, other than the officers, before signing the confession admitted in evidence?

(4) The only warnings given to petitioner were given after he had orally confessed, and were given to him in general terms by the interrogating law enforcement officers?

(5) His confessions were the fruits of an unlawful arrest by an officer who had no authority in the investigation and admittedly could not have obtained a warrant for petitioner's arrest?

(6) Petitioner was not afforded counsel at the preliminary hearing, or at any time prior thereto, and counsel was not present at the time the confessions were signed?

(7) The petitioner was not taken before a magistrate for a period of 38 hours following his arrest, and until after he had signed the first confession, and was not thereafter delivered into custody of the proper authorities as required?

(8) The petitioner had been denied the right to see and inspect the first two written confessions, which were not introduced in evidence?

Constitutional and Statutory Provisions Involved

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . "

Amendment V to the Constitution of the United States:

> "" . . . nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

Amendment VI to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence."

Amendment XIV to the Constitution of the United States:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

Article 212, Vernon's Annotated Texas Code of Criminal Procedure (1925):

> "A peace officer or any person may, without warrant, arrest an offender when the offense is committed in his

presence or within his view, if the offense is one classed as a felony, or as an 'offense against the public peace.' "

Article 213, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate virtually orders the arrest of the offender."

Article 214, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

Article 215, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

Article 217, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Article 245, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 250, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"If any person appear to prosecute as counsel for the State, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

Article 251, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial."

Article 261, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and facts of the case may require."

Article 264, Vernon's Annotated Texas Code of Criminal Procedure (1925):

"A commitment is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed. It will be sufficient if it have the following requisites:

"1. That it run in the name of 'The State of Texas.'

"2. That it be addressed to the sheriff of the county to the jail of which the defendant is committed.

"3. That it state in plain language the offense for which the defendant is committed, and give his name, if it be known, or if unknown, contain an accurate description of the defendant.

"4. That it state to what court and at what time the defendant is to be held to answer.

"5. When the prisoner is sent out of the county where the prosecution arose, the warrant shall state that there is no safe jail in the proper county.

"6. If bail has been granted, the amount of bail shall be stated in the warrant."

Article 265, Vernon's Annotated Texas Code of Criminal Procedure (1925):

> "Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner."

Statement

On May 11, 1964, petitioner's trial for the offense of murder was begun in the District Court of Midland County, Texas. The indictment under which petitioner was tried alleged that he "did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewis by choking her with a belt and in some way or manner, and by some means, instruments and weapons, to the Grand Jurors unknown" (R. 1). The trial consumed six days, and a verdict of guilty was returned by the jury on May 17, 1964, and punishment assessed at confinement in the state penitentiary for a term of twenty-five years (R. 23). At the trial, petitioner contended that the confession introduced in evidence (R. 428-429) was an involuntary statement, which had been secured by means of coercion, threats, physical abuse, and that his will had been overborne.

At the beginning of the trial, petitioner filed a Motion to Exclude and Suppress State's Confessions (R. 6-11), and evidence on this motion was heard by the Court outside of the jury's presence (R. 94-156, 223-225). The state presented rebuttal evidence by its officers (R. 157-223, 225-228).

The constitutional grounds herein presented were relied upon by petitioner in the trial court in his Motion for Instructed Verdict (R. 431-433) and Motion for New Trial (R. 30-36), both of which were overruled by the trial court. Judgment was entered on the jury's verdict (R. 24) and Marvin Clewis was thereafter sentenced in accordance therewith (R. 37).

The facts as developed by the testimony of witnesses at the trial were these:

On Thursday, July 5, 1962, two Latin American boys found the remains of what they believed to be a human body in a shallow grave about two miles north of the city limits of the City of Midland, Texas (R. 40-41). This discovery was reported by them to the sheriff's office, and sheriff's deputies went to the scene and dug from the ground the remains of a human skeleton (R. 41). These remains were then delivered to Dr. Martha Madsen, a local pathologist, who examined them and expressed an opinion that death had occurred from "six weeks to three months" prior to July 5 (R. 46). There was no skin or other matter from which either the deputies or Dr. Madsen could identify the color, sex or features of the skeleton (R. 43-44, 241-242, 244). Both the pathologist and the sheriff's deputies testified at the trial that there was absolutely no way to determine the cause of death (R. 45, 54, 242, 243), and there is no evidence in the record that death was caused by means of any criminal agency. The officers testified (R. 44-45, 54) that a belt found around the neck could have been used to carry the body, rather than as a fatal instrument. Appearing as a witness for the state, Dr. Madsen revised her original opinion, and stated that death "could" have occurred "about six months" prior to discovery (R. 242),

and this new estimate could place the death at about the time Dorothy Mae Clewis was last seen by the witnesses (January 21), which is the date alleged in the indictment (R. 1). Dr. Madsen gave rather vague estimates of the probable height and weight of the person whose bones were found, testifying that the age of that person was "28 to 35" and that this age range is reliable (R. 245). The testimony showed that Dorothy Mae Clewis was 40 years old when she disappeared in 1962 (R. 260), and that she had been married to Marvin Clewis for seven years at that time. The testimony further showed that there was another woman who was missing in Midland at the same time these bones were discovered (R. 378).

Some teeth and gold dentures were found in the skull (R. 50). A plaster cast was made by a local dentist of the dentures (R. 50), and a colored dentist from Waco testified that in 1951 or 1952, he had made the teeth represented by the plaster cast (R. 63). Although he had seen the person he identified as Dorothy Mae Charles only three times (R. 63-64), he nevertheless identified these teeth as those he had made for Dorothy Mae Charles 12 or 13 years previously (R. 65-66).

He testified that he saw an average of "four or five thousand patients a year" (R. 63), and said that all of his records were destroyed in a tornado in 1953 (R. 65), and that he had no records to consult or to present to substantiate his identification (R. 65-66). He testified that the prosecutor had come to Waco—which is more than 300 miles from Midland—on three separate occasions to talk to him about the identification (R. 67). We submit that the bones were not sufficiently identified on this trial as belonging to Dorothy Mae Clewis, and petitioner so contended

in the trial court (R. 431, 437, 33, 35), and in the Court of Criminal Appeals of Texas. These contentions were overruled by both courts.

Aside from his confessions (of which there were three in writing and which were inconsistent and contradictory), there is no evidence in this record which in any way connects petitioner with the crime, if indeed there was a crime. There is, however, evidence from Dorothy Mae's employer that the wife of one Jimmy Davis had made telephone threats against the life of Dorothy Mae Clewis (R. 426). Jimmy Davis was identified by her daughter as one of several men Dorothy Mae was "going with" (R. 82-83). There is further evidence in the record that Dorothy Mae Clewis had taken a considerable amount of money "off a drunk man, 'sleep," and that she was leaving town (R. 320). Another witness testified that Dorothy Mae Clewis had called him on the telephone on two occasions, several weeks after she had disappeared (R. 257-258).

Marvin Clewis continued to look for his wife in Midland and other cities, after she disappeared (R. 80, 333); continued to maintain their apartment, and Dorothy Mae's son by a previous marriage continued to live with him. Dorothy Mae's mother prepared meals for petitioner, testifying that she "fed him for three whole months at my house" until he was transferred from Midland to Borger, Texas, by his employer (R. 332, 333). Although Dorothy Mae's mother, Rachel Garnett, and her daughter, Shirley Jean Judie, testified at the trial that Marvin Clewis had threatened his wife and that they had on occasion had trouble (R. 74, 332), neither of them ever mentioned any of these facts to the police although they had talked with the police on different occasions in an attempt to locate Dorothy Mae

(R. 82, 86, 250, 333). Her daughter said "she had too much responsibility at home to see after it" (R. 82). To the contrary, they testified that Marvin Clewis had continued to search for his wife and to make inquiries about her for several months after her disappearance (R. 80, 333, 334). He was not suspected by them at all (R. 80). Everybody concerned believed that Dorothy Mae Clewis had simply "taken off" with a man, as she had done many times before (R. 70, 82, 254).

Petitioner, at the time the bones were discovered, had worked for more than seven years for the same employer, who testified at the trial that he was a hard-working, dependable employee who told the truth and never got in any trouble (R. 323-326). Deputy Sheriff Gene Howell testified that his reputation as a peaceable, law-abiding citizen was good and that he knew of no law violations (R. 237). He had never been in trouble with the law, and had never been convicted of a felony (R. 283).

Most of the testimony at the trial, other than that referred to above, dealt with three written confessions which were taken by the officers—only one of which was introduced in evidence—and his arrest without a warrant by a city police officer who had not participated at all in the investigation of the case, and whose jurisdiction as an officer did not extend to the place where the body was found. We shall attempt to set out these facts in chronological order, as they appear in the Record.

SATURDAY, JULY 7

Petitioner's whereabouts were well known, and the sheriff's deputies knew that he was working in Borger, Texas, for the same employer for whom he had then worked

for more than seven years. On Saturday, July 7, one of the deputies told petitioner's sister that "if and when" petitioner came to Midland, he would like to talk to him (R. 59). Petitioner's sister talked with petitioner in Borger, by long-distance telephone, when he came in from work that evening, and he left by automobile for Midland—a distance of 300 miles—immediately after talking with her (R. 101, 265). Petitioner voluntarily reported to the sheriff's office about 11:30 P.M. and was questioned by deputy sheriff Kirksey until about 1:30 or 2:00 A.M. Sunday (R. 55, 102). Petitioner was then told that he might leave and go home, but that he should return the following morning about 8:00 A.M. to talk to the sheriff (R. 57).

SUNDAY, JULY 8

At 6:00 A.M. on Sunday, July 8, Marvin Clewis was awakened by Jesus Morales, a city police officer, who took him into custody at the home of Elizabeth Johnson, where he was sleeping (R. 375). Morales testified that he walked in the bedroom and "advised him that I wanted to talk to him . . . at the police station and asked him if he would come along" (R. 157-158). Petitioner testified (R. 103) that Morales told him to "come on and go with him." This offense had occurred outside the city limits of Midland, Texas, at a place admittedly outside the jurisdiction of the Midland Police Department and officer Morales (R. 43, 171, 376). Morales had not participated in the investigation of the case, which had been conducted by the Midland County Sheriff's Department, and no assistance from Morales or the city police had been requested (R. 43, 171, 376). Neither Morales nor any other police officer had said anything about questioning Clewis (R. 58), and Morales

was not in possession of any facts connecting Clewis with the death of Dorothy Mae Clewis (R. 170-171). Morales had no warrant for the arrest of Marvin Clewis (R. 170, 375), and testified that he knew at the time that he did not have sufficient grounds to procure the issuance of a warrant for any such arrest (R. 170-171). At the time Morales arrested Clewis, the bones had not been identified (R. 173, 379), according to Morales, who further testified (R. 172): "I didn't even know that was his wife out there." Nevertheless, Morales took Clewis to the police station, questioned him, took his belongings, and locked him up, thereby placing him under arrest (R. 172). Clewis asked to make a telephone call, but was refused (R. 117). Morales continued to question Clewis throughout the day on Sunday and admitted to questioning him for at least six hours (R. 379). According to Morales, he was trying to get Clewis to sign a polygraph waiver (R. 379). Clewis testified that the officers were also attempting to make him confess that he had murdered his wife (R. 107, 270). Late Sunday afternoon, petitioner's sister, his mother-in-law and Elizabeth Johnson visited with him in the presence of police officers, but he was never permitted to visit with them alone (R. 174, 352, 218, 379, 421). These people visited with Clewis at the instigation of officer Morales and they encouraged him to agree to take a polygraph test (R. 169-170, 379-380). He did sign a polygraph waiver on Sunday night.

Petitioner testified that he had nothing to eat from Saturday before he left Borger for Midland, until the following Tuesday, except for a quart of milk on Monday after he made the first confession about 6:00 P.M. (R. 115, 120, 288). Officer Morales testified that he gave petitioner a sweet roll and some coffee at 6:30 A.M. Sunday when

they arrived at the police station (R. 376-377), which Clewis denied (R. 271). Morales admitted that Clewis had nothing to eat all that day and until he signed the first confession late Monday evening (R. 182-183, 383). Morales testified (R. 182-183):

> "Q. But by your own testimony, Sgt. Morales, you admit, don't you, that to your knowledge he didn't have anything to eat from early Sunday morning around 6:00 or a little after, until he made this statement, except for a coke and, you say, some milk? A. He was given an opportunity to have anything he wanted.
>
> "Q. Did he have anything to eat? A. He didn't want any.
>
> "Q. The question is, did he? A. No, sir."

The officers testified that he was "offered" food but refused it (R. 177, 379). Petitioner and his sister said none was offered (R. 110, 271-272, 424). Clewis testified that he was questioned almost continuously Sunday night "until about 2:00 A.M. on Monday morning" (R. 106-107, 132-133, 276). The officers testified that he was not questioned past midnight on Sunday (R. 161, 219, 349).

MONDAY, JULY 9

As noted above, petitioner testified he was questioned until "about 2:00 A.M."

Morales testified that he took petitioner from his cell about 7:00 A.M. on Monday and that petitioner was taken to the place where the bones had been found (R. 161, 380). He was led to the "grave" (R. 109, 161-162, 181, 277), and was asked if he knew what it was. He answered: "I told

him I guessed that was where he found the body at" (R. 109). Petitioner had, of course, been told about the grave by others (R. 100, 109, 277-278). Clewis testified that he was questioned about the crime while at the grave (R. 110). About 8:00 A.M., Morales and another officer took Clewis to the Texas Department of Public Safety Building outside the city limits of Midland, Texas (R. 110, 163, 179, 381). He was given four polygraph tests (R. 197, 336), and was interrogated Monday by at least six officers (R. 179, 209, 214, 339-340, 349, 402, 407). The testimony establishes unequivocally that petitioner had nothing but a Coke in the way of food or nourishment during that day until after he had confessed to killing Dorothy Mae Clewis by *shooting* her (R. 115, 178, 362, 369, 383, 400). A newspaper reporter testified that one of the officers told him that petitioner said, late Monday afternoon: "Just bring me some milk and I will give you a statement and sign it" (R. 225). Clewis also testified to that effect (R. 115, 287), and further testified that "I was tired and I was hungry and I was sick" (R. 287) and further (R. 288):

> "I was sick at the stomach. My stomach was bothering me. I hadn't eaten nothing since that Saturday."

Clewis denied that he was given even a Coke on Monday (R. 288) or that he was ever offered anything at all to eat, either Sunday or Monday (R. 133, 139, 288, 311). The evidence further shows that the officers were aware that defendant suffered from a ulcer condition (R. 212).

The record is absolutely silent concerning any warning which was given to petitioner on Sunday or on Monday. Morales testified that petitioner first confessed orally (R. 180, 190), but said nothing about any warning prior to

either the oral or written confession. This first confession was procured late in the evening (R. 115, 201, 211, 290, 370). Clewis testified that the officers told him that he could not leave the Department of Public Safety Building until they got what they wanted (R. 114, 284, 302). During the interrogations, petitioner was placed in a little room with only one chair and an ashtray (R. 390-391). This is the room in which all of the interrogation took place at the Department of Public Safety. Marvin Clewis had repeatedly denied any guilt, or any knowledge concerning the death of his wife (R. 104, 105, 107, 191, 197, 211, 269, 274, 276, 317, 341). He testified that he was struck, cursed, and threatened by the officers while at the Department of Public Safety on Monday (R. 112-115), but the officers denied this. A portion of Clewis' testimony follows:

"Q. Now, Marvin, did anyone threaten you during that time? A. Yes, sir.

"Q. Who? A. Ranger Wood.

"Q. All right, who else? A. Sgt. Morales.

"Q. Anybody else? A. The fellow who was giving the polygraph test.

"Q. All right. Now, what did they tell you they were going to do, if anything? A. Am I allowed to say that here?

"Q. What did Ranger Wood say to you? A. He said if I didn't confess, they were going to take me out to the grave and beat my black ass until I couldn't sit down."

* * * * * *

"Q. Did he make any motions as if to hit you, or anything else? A. He drawed back on me.

"Q. Did he threaten you or say anything else to you?

A. Yes, he said he would turn my black ass wrong side out.

"Q. Did he call you any names? A. Yes, 'black son-of-a-bitch.'"

* * * * *

"Q. Well, did you make a statement to them, Marvin, that you would sign a statement if they would bring you some milk? A. Yes, sir.

"Q. All right, and when was that? A. That was after the polygraph operator hit me."

Although each officer denied any cursing, threatening or physical abuse, they did admit they were trying to get him to confess (R. 179, 187-188, 199, 344, 383, 393, 413), although the phrases used were that they were "trying to get him to tell us the truth," or "trying to get the facts." Both Morales and Wood admitted they were trying to get Clewis to sign a statement (R. 393, 413), although Ranger Wood testified that he "did not remember" what he told him (R. 188, 189, 414). Officer Reid testified that his questioning of Clewis was "more or less repetitious" (R. 201, 341). Officer Reid admitted talking to him as many as five times in addition to the polygraph examinations on Monday (R. 342); Ranger Wood and Sgt. Morales talked to him "several times" (R. 381); officer Robbins talked to him (R. 349); officer Gideon talked to him (R. 209, 402); and officer Robbins admitted interrogating him together with officer Wicker for about an hour on Monday night, ending shortly before 11:00 P.M. (R. 214). Other officers were coming back and forth all day, observing the interrogation (R. 398). According to Clewis, only three of the officers abused him, as detailed above. There was a two-way glass at the

Department of Public Safety Building between an outer office and the little interrogation room (R. 370, 398).

According to the officers, petitioner was taken from the Department of Public Safety to the police station about 7:00 P.M. (R. 370), and was given some soup (R. 360). Officer Herman Wicker testified as follows (R. 360):

> "... I noticed he began to act like he was wanting to vomit, or acted kind of like he was sick, and I asked him was he all right, and he said well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there, and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said, 'No.'"

Following this incident, at about 8:00 P.M., Marvin Clewis was—for the first time—taken before a magistrate (R. 174, 419), and a complaint was filed with the Justice of the Peace charging that he had killed Dorothy Mae Clewis "by shooting her with a gun" (R. 418). The officers knew that the law required that an accused be taken immediately before a magistrate (R. 384-385), but that requirement was ignored in practice. Petitioner was not afforded counsel at this preliminary hearing (R. 289), and the record does not disclose that he was ever apprised of his right to counsel. Petitioner testified that he did not understand the proceedings (R. 116, 289). His bond was set at the sum of $10,000 and the magistrate ordered that he be remanded

to the custody of the sheriff of Midland County, Texas (R. 389). Instead of being delivered to the sheriff of Midland County as directed by the warrant which then issued, petitioner was taken again to the police station (R. 389).

Marvin Clewis was further interrogated on Monday night (R. 118-119, 214, 349), despite the fact that he had been sick. The officers testified that they interrogated him no longer than an hour (R. 214), but petitioner testified that he was interrogated until "around 3:00" Tuesday morning (R. 119). The officers evidently were not satisfied with the statement they had obtained from Clewis that he had shot his wife; and according to petitioner, they accused him of lying in that statement as to the way that his wife was killed (R. 119). He testified that at least three officers interrogated him during that night-time session (R. 118-119).

Petitioner said at the trial that, in the statement given Monday night, he was "just agreeing with Sgt. Morales as to about what happened" and that "Well, I would answer them the way I figured he wanted me to" (R. 286-287). He was allowed to make a telephone call for the first time after he signed the confession, but testified that he was unable to reach the party he called (R. 139-140). He was refused permission to make a telephone call on Sunday (R. 117).

TUESDAY, JULY 10

Petitioner testified he was interrogated at the police station until the early hours of Tuesday morning (R. 119, 312), and all day Tuesday and Tuesday night until after

midnight (R. 120, 312). Testimony for the state showed that he was interrogated on two occasions only during that day, and for short periods (R. 226). Petitioner testified that on Tuesday morning, he was given "a roll and a potato and a slice of bologna" (R. 143), and that this was the first thing he had eaten, except for one quart of milk, since the preceding Saturday night (R. 120). His sister testified that she went to the police station and asked to see him but was refused permission to do so (R. 422), and this is uncontradicted in the Record.

WEDNESDAY, JULY 11

Ranger John Wood testified that he picked up the defendant and officer Morales at the police station at 6:55 A.M. on Wednesday morning (R. 188, 409). This was before breakfast, and Clewis was taken from Midland, Texas, to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410). The reason given by the officers for this trip was that they needed Clewis to identify his panel truck which they understood was in Borger (R. 386-387, 417). The Texas Ranger, Morales, and a chemist questioned petitioner en route to Borger (R. 121, 365, 386, 414). Petitioner testified that he was threatened and cursed, and that he was interrogated on the way to Borger (R. 121), and on the way back from Borger (R. 300-301):

> "Q. All right, on the way back from Borger, did he talk to you about it? A. Yes, sir.
>
> "Q. What was he trying to get you to do then? A. Well, he was still talking the same thing about signing a confession, that I choked my wife and I didn't shoot her.
>
> "Q. That was what he was saying? A. Yes, sir.

"Q. All right. Now, did Sgt. Morales threaten you on that trip? A. Well, he cursed me a couple of times and, I don't know, he would say something to me and I guess I wouldn't pay him no attention, which I tried not to hear what he was saying, and he drawed back a couple of times.

"Q. He drawed back a couple of times? A. Yes, sir.

"Q. With his hands? A. Yes, sir.

"Q. Never did strike you? A. No, sir."

Upon arrival in Borger, petitioner was required by the officers to point out his truck, and it was searched (R. 122). Petitioner testified that he was not allowed to talk to any persons (R. 309), but the officers testified that he did talk to some person in Borger (R. 372, 410). Clewis also testified that Ranger Wood cursed him and drew back as if to hit him (R. 308), during the search of the truck. Both petitioner and Ranger Wood testified that petitioner was locked up in the city jail in Borger (R. 300, 416). According to the testimony of the state, he was then brought back to Midland, Texas, by automobile and returned to the city jail about 7:15 P.M. (R. 411). He was further interrogated on Wednesday night by officer Herman Wicker (R. 361). Both the officers and petitioner testified that he was given nothing to eat that day except that he was given "a carton of milk" in Borger (R. 122, 300, 416).

THURSDAY, JULY 12

On Thursday morning, petitioner was again taken to the Department of Public Safety Building outside the Midland city limits and was subjected to an extended period of interrogation lasting all day long (R. 389, where Sgt. Morales testified that he was kept out there from 8:30 A.M.

until "about 6:00 o'clock" that evening). The officers testified that Clewis was given nothing to eat on Thursday prior to the time he signed the second confession (R. 391, 415). The two officers did not agree, one testifying he had some milk, and the other testifying that he refused milk. Marvin Clewis continued to deny any guilt in connection with the death of his wife (R. 125, 197, 302). He was given three more polygraph tests (R. 198, 199-200, 342), which petitioner said were taken over his objections (R. 123). He was again questioned by officers Morales, Reid and Wood (R. 124-126, 189, 199, 389, 391-392). After prolonged interrogation and after being physically and verbally abused (R. 125-126, 303-304), the latter being denied by the officers (R. 182, 186, 200), petitioner signed a second confession about 6:00 P.M. (R. 389), in which it was stated that he had killed Dorothy Mae Clewis by choking her with a belt (R. 126, 419). He first confessed orally to Ranger Wood (R. 190). Petitioner testified that Morales pushed him (R. 302), that Wood cursed and threatened him (R. 303), and that Reid cursed him and hit him in the stomach, knocking him out of the chair (R. 303-304). After this last incident, petitioner testified that he gave them the second statement (R. 304):

> "Q. Now, Marvin, how long after that then did you give them another statement? A. I gave them a statement right after that.
>
> "Q. All right, and why did you give them that statement? A. Well, I was tired and I just felt like I couldn't take no more, so I just went on and gave them a statement, and I was hurting so I didn't figure I had no choice."

Major Taylor of the police department testified that, "Word had got back to us that . . . he said he had been mistreated" (R. 396). Petitioner was again interrogated on Thursday night (R. 204), and was not turned over to the sheriff but was kept at the police station, even after the second confession was signed (R. 375), and was kept overnight in the city jail.

FRIDAY, JULY 13

The testimony is conflicting as to when petitioner talked with an attorney. According to Sgt. Morales, Clewis talked with H. S. Harris, Jr., on Thursday morning before being taken to the Department of Public Safety and his subsequent confession there (R. 374, 388). Petitioner testified that he talked with the attorney on Friday morning, after he had made the first two statements, but that the attorney did not represent him and did not give him any advice, but only discussed the fee which would be required (R. 154-156, 314). Clewis' sister asked the lawyer to go see petitioner, but testified that the lawyer did not take petitioner's case (R. 422-423), and that she knew she could not raise the money to retain him. The lawyer did not tell the police he represented Clewis (R. 388). Petitioner was finally delivered—for the first time—to the custody of the sheriff of Midland County, Texas, on Friday afternoon, and was then placed in the county jail (R. 231). Clewis made no complaint of interrogation or any deprivation of food or sleep on this date.

SATURDAY, JULY 14; SUNDAY, JULY 15; MONDAY, JULY 16

Petitioner remained in the county jail of Midland County, Texas, saw no lawyer (R. 237) and was not interrogated.

He did not complain of being mistreated during these days at the county jail.

TUESDAY, JULY 17

About 9:30 in the morning, petitioner was brought to the sheriff's office and two deputies began to interrogate him (R. 231-232). The lawyer to whom petitioner had talked was not notified or summoned to be present; the deputies testified that they were not aware that any lawyer represented him; and petitioner was not told of his right to counsel (R. 99, 236-237). He again denied guilt (R. 232), and reluctantly related to the sheriff's deputies the threats and abuse which he claimed had been inflicted by officers Morales, Reid and Wood (R. 96, 233-234). During the course of this interrogation, he asked to "talk to someone" (R. 98, 235). He specifically asked to talk to his "boss man" who lived in Odessa, Texas, but the deputy sheriff said he could not reach him by telephone (R. 235). The deputy sheriff then called the district attorney of Midland County who came down and talked to petitioner (R. 95, 152, 153, 233), and after that conversation, the petitioner orally confessed. His confession was later reduced to writing (R. 95, 153). There is testimony that petitioner was given the formal statutory warnings by the deputy sheriff prior to this third written statement (R. 93), but there is no evidence that he was warned prior to his oral admission. He was told that he might be given further polygraph tests (R. 127, 236). About 10:45 the written statement was begun and was thereafter signed by petitioner (R. 232). This is the statement which was introduced in evidence at the trial as State's Exhibit 13 (R. 428-429), over objection by petitioner (R. 228, 230).

At the trial, petitioner stated that all three confessions were false and, regarding the third confession, he testified (R. 514):

> "Mr. Mims came down there and I could see it all over again, the same thing. I went three or four days already on the same kind of thing and they, the other officers, said that they wouldn't do this and wouldn't do that but they did, and I didn't have no reason to believe they wouldn't be any different than them. I didn't think I could go through that kind of punishment again, so I had signed one statement, two statements, at least, and I didn't figure it made much difference . . . I was scared. I was scared they would do the same thing."

Petitioner further testified (R. 317):

> "If you was locked up some place like that and everybody against you, wouldn't you be scared, too?"

At the beginning of the trial, petitioner filed a Motion to Require State to Produce Confessions (R. 3-5), and contemporaneously filed a Motion to Exclude and Suppress State's Confessions (R. 6-11). In both of these motions, petitioner contended that the confessions were involuntary and were taken in violation of his rights under the Constitution of the United States. These motions were filed before any evidence was submitted and were overruled at that time (R. 88). The Motion to Exclude and Suppress State's Confessions was again presented before the confession was introduced (R. 87-92), and voluminous testimony was introduced on the motion by both petitioner and the prosecution (R. 92-228). The motion was then over-

ruled by the trial court (R. 228). The trial court did not file any findings of fact until eight months after the trial was begun, and on the day prior to the submission of the case on oral argument in the Court of Criminal Appeals of Texas (R. 440, 454-455), but the Court of Criminal Appeals accepted such Findings of Fact, though the finding and filing of such facts was considerably belated (R. 461, 472).

Following conviction, petitioner perfected his appeal to the Court of Criminal Appeals of Texas, and in three written opinions (R. 441, 461, 472), that Court affirmed the conviction and held that the action of the trial court in overruling our Motion to Exclude and Suppress State's Confessions was proper. That Court cited only one case from the Supreme Court of the United States (*Lyons* v. *Oklahoma,* 322 U.S. 596, 88 L.Ed. 1481, cited at R. 444, other than *Escobedo* v. *Illinois, infra,* which was held not to apply in this case). In its original opinion, the Court of Criminal Appeals did not discuss petitioner's contention that *Wong-Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, required reversal in this case and exclusion of the confessions. This contention had been advanced at length in our original briefs and again in Appellant's Motion for Rehearing (R. 451-454), and in Appellant's Second Motion for Rehearing (R. 464-469). In the opinions of November 10, 1965 (R. 461), and January 5, 1966 (R. 472), the Court of Criminal Appeals attempted to distinguish the facts in this case from the facts in *Wong-Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 and *Collins* v. *Beto,* 348 F.2d 823 (5th Cir., 1965).

On January 18, 1966, the Court of Criminal Appeals of Texas entered its order granting to petitioner a stay of

mandate pending application to the Supreme Court of the United States for a writ of certiorari (R. 479). Thereafter, Marvin Clewis filed his Petition for Writ of Certiorari in this Court, together with his Motion to Proceed in Forma Pauperis, and the petitioner's motions were granted on October 10, 1966 (R. 481).

Summary of the Argument

1. This case is presented as a "totality of the circumstances" case. *Fikes* v. *Alabama,* 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957); *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Haynes* v. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Culombe* v. *Connecticut,* 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, —— L.Ed.2d —— (1966). Three written confessions were obtained by the officers from Marvin Clewis, and each of these confessions was inadmissible under the rules laid down by this Court. We have detailed the facts chronologically in the *Statement* portion of this Brief. At the risk of repetition, but because the facts are determinative of the result in this case, we have again detailed them categorically in our Argument to demonstrate that petitioner's will was overborne each time he confessed. The totality of the circumstances rendered the use of the third confession at the trial a denial of due process. The same coercive circumstances which produced the first two confessions were still operating when Clewis signed the third confession.

Clewis was subjected to prolonged interrogation and incommunicado detention, causing his will to be overborne

after he was arrested illegally and without a warrant by a police officer who did not take him before a magistrate until 38 hours later, after the first confession. During his detention, petitioner was not given proper or adequate food or rest, and his basic rudimentary need for these things was disregarded by the police officers. At the time the statements were made, petitioner was in a weakened condition and was sick, so that his confessions cannot be deemed to be the product of a rational intellect and a free will.

During his prolonged interrogation by police officers, Marvin Clewis was never advised of his absolute right to remain silent and to refuse to answer, and the Record in this case does not reveal that he was ever given any warning prior to confessing orally or prior to signing the first two confessions. At no time was Clewis advised of his right to counsel, and he was not represented by counsel during the interrogation or until long after the confessions were signed. The assistance of counsel was of vital importance at his preliminary hearing. Clewis testified he was physically assaulted, threatened, cursed, and abused by the officers prior to making the first and second confessions. He was moved from jail to jail and was incarcerated in three jails, one of which was more than 300 miles away.

2. The arresting officer admitted that he arrested Clewis without probable cause, and that he had no grounds sufficient to secure a warrant for that arrest. Petitioner had come voluntarily to the sheriff's office and had been questioned by a deputy sheriff on the night before his unlawful arrest. The deputy sheriff had told him to go home and come back the following morning, but the city police officer,

who had not participated in the investigation of the case, woke him up at 6:00 A.M. the following morning and took him to the police station where he began the lengthy interrogation. Under the exclusionary rule of *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962) and *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), no confession made by Clewis after this arrest was admissible against him. The "fruit of the poisonous tree" doctrine forbids the use of such confessions, and the mere passage of time cannot dissipate the taint of unlawful arrest.

3. Petitioner should have been permitted to examine all three written statements in possession of the state, under the policy requiring full disclosure in criminal cases, and refusal of his motion constituted a denial of due process.

ARGUMENT

1.

The Statements Made by Petitioner and the Written Statement Introduced in Evidence in This Case Were Involuntary and Were Made at a Time When Petitioner's Will Was Overborne, and the Totality of the Circumstances Preceding the Confession Establishes That Its Use in Evidence Was a Denial of Due Process Under the Fourteenth Amendment to the Constitution of the United States.

Under the rules laid down by this Court in its decision in *Miranda* v. *Arizona*, 384 U.S. ——, 86 S.Ct. 1602, 16 L.Ed.2d —— (1966), the testimony of the police officers alone in this case would, we respectfully submit, require reversal. This trial was begun on May 11, 1964, some

six weeks prior to the decision of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Because *Miranda* and *Escobedo* were applied prospectively, *Johnson* v. *New Jersey,* 384 U.S. ——, 86 S.Ct. 1772, 16 L.Ed.2d —— (1966); petitioner relies in this case on a long line of decisions preceding the *Miranda* decision and upon *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, —— L.Ed.2d —— (1966), wherein Mr. Chief Justice Warren wrote:

> "As we pointed out in *Johnson,* however, the non-retroactivity of the decision in *Miranda* does not affect the duty of courts to consider claims that a statement was taken in circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) . . . The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions—a standard grounded in the policies of the privilege against self-incrimination. *Malloy* v. *Hogan,* 378 U.S. 1, 6-8, 84 S.Ct. 1489, 1492-1493, 12 L.Ed.2d 653 (1964).
>
> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made."

The Court further said (86 S.Ct. 1761, 1764):

> "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness."

This, then, is a "totality of the circumstances" case. As this Court said in *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957):

> "Standing alone, the state's evidence establishes that the confessions in the present case were not voluntary within the meanings of the decisions of this Court. . . . He was questioned for several hours at a time over the course of five days preceding the first confession, and again interrogated at length before the written confession was secured. There is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here. . . . *The totality of the circumstances that preceded the confessions in this case goes beyond allowable limits. The use of confessions secured in this setting was denial of due process.*" (Emphasis our own.)

As we have pointed out above (Br. 11, 12), three written confessions were obtained by the officers from Marvin Clewis. The state introduced only the third confession, which was taken by sheriff's deputies and which was not preceded by any independent coercive influence for a period of four days prior to its taking (R. 150-152), except for the fear of another polygraph examination (R. 127, 153). Petitioner contended at the trial (R. 7, 30-33, 87-88, 127-

128, 432) and in the Court of Criminal Appeals of Texas that the third confession was not admissible because the coercive influences attending the first two confessions carried over and the third confession was produced by the same influences. *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957); *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). All three confessions were, under the facts here present, subject to the same infirmities.

This Court has repeatedly stated that it will make an independent examination of the facts in cases where the voluntariness of a confession is questioned. The facts being of greatest importance in this case, we feel compelled to restate them categorically as we present our argument. What, then, are the facts which establish coercion in this case? They are considerable, and many of the most significant facts of coercion are established by the testimony of the officers themselves. We shall attempt to discuss the facts under the headings in "Questions Presented" above (Br. 2, 3), in order to fully demonstrate the involuntary nature of each of these confessions.

A. *Marvin Clewis was subjected to prolonged interrogation and incommunicado detention after being arrested illegally and without a warrant at 6:00 A.M. on Sunday morning on July 8 by a police officer who had not participated in the investigation and admitted that he had no grounds upon which a warrant could issue for petitioner's arrest.*

Petitioner was taken to the Midland police station and questioned by officer Morales. That officer said he was "in-

vestigating a Missing Persons Report" (R. 377), although Dorothy Mae Clewis had been "missing" for almost six months. Morales continued to question him all day Sunday, admitting that the questioning covered a period of six hours on that day (R. 379). Petitioner testified that he was questioned much longer than that period during the day Sunday (R. 104-106, 268-270), and that other officers questioned him beginning on Sunday morning (R. 104). Officer Robbins did admit that he was in the room with petitioner and Morales during the time that visitors were there Sunday (R. 352). Petitioner's testimony was that Morales and the other officers were trying to get him to confess that he had killed his wife (R. 107, 269, 270), and that they "wanted me to sign some papers" to take a lie detector test (R. 270). Morales admitted that he was trying to get petitioner to sign a polygraph waiver (R. 379), although he testified that he didn't say anything to Clewis about murder or the grave or "anything" on Sunday (R. 392-393). This is hardly believable, in the light of the Record. Morales further admitted talking to petitioner's mother-in-law on Sunday, and "possibly" telling his mother-in-law to encourage Clewis to agree to a polygraph examination, and that it would help him (R. 169-170). Petitioner insisted that the questioning continued all of Sunday night and until about 2:00 A.M. Monday (R. 106-107, 132-133, 312). The officers testified that he was not questioned at any time after midnight (R. 161, 219, 349).

On Monday morning, before 7:00 A.M., petitioner was taken by three police officers to the "grave" where the bones had been excavated. He was questioned there (R. 109-110). Morales described this event in this way on cross-examination (R. 380):

"Q. What time did you see him Monday morning? A. Oh, around 7:00.

"Q. And what was that for? A. Oh, we took him for a ride, out in the country."

This was a most harrowing experience for Marvin Clewis, and was an attempt by the police to play upon his ignorance and his superstitions, and to frighten him. It was just another of the many pressures which the police applied with regularity in their determination to break the prisoner down. Clewis was then taken to the Department of Public Safety outside the Midland city limits, where he was given four polygraph tests and admittedly interrogated by at least six officers (R. 179, 197, 209, 214, 336, 339-340, 349, 402, 407). About 6:00 P.M. Monday, he signed the first confession, in which he stated that he had killed his wife by "shooting her with a gun" (R. 117, 286, 418-419).

During all the interrogations on Monday, petitioner was placed in a little room with only one chair and an ashtray and nothing else (R. 390-391). The officers then took him before a magistrate, and a complaint was filed with the Justice of the Peace (R. 174, 418-419). This is the first time any charge had been filed against petitioner, and the only time he was taken before a magistrate. Petitioner was then returned to the police station and was further interrogated on Monday night (R. 118-119, 214, 349), despite the fact that the police officers admitted that he was sick following the first confession (R. 360). Although Robbins stated this session ended at 11:00 P.M., petitioner testified that he was interrogated until the early hours of Tuesday morning (R. 119, 312) by relays of officers. Officer Kuykendall admitted interrogating petitioner on two occasions

Tuesday, for short periods (R. 226), but petitioner testified that he was interrogated all day Tuesday and until after midnight on that date (R. 120, 312).

On Wednesday, Ranger Wood, officer Morales and Mr. Merritt took Clewis out of his cell at the police station at 6:55 A.M. and took him by automobile to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410). He was questioned en route to Borger (R. 121, 365, 386, 414), and petitioner testified that he was threatened and cursed (R. 301). The officers locked Clewis up in the city jail in Borger (R. 300) while they went to lunch. He was then brought back to Midland, Texas, and again returned to the city jail about 7:15 P.M. (R. 411). Officer Herman Wicker admitted that he interrogated Clewis on Wednesday night (R. 361).

Transporting a prisoner a long distance and locking him up in jail in another city is the same kind of conduct which was condemned by this Court in *Ward* v. *Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942), and *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). This was simply one more pressure which the police were applying at their pleasure.

Thursday morning, petitioner was again taken to the Department of Public Safety Building from the police station and was interrogated all day long (R. 389). The officers were not satisfied with the first confession which they had taken, and were unable to find any evidence of any gunshot wounds. Because of that, they were determined to force a confession out of Marvin Clewis which would satisfy the meager evidence which they had on hand. Marvin Clewis continued to deny any guilt in connection with the death of his wife (R. 125, 197, 302). He was

given three more polygraph tests (R. 198, 199-200, 342), and they finally extracted a confession from him about 6:00 P.M. (R. 389), in which it was stated that he had killed Dorothy Mae Clewis by choking her with a belt (R. 126, 419).

On Monday and again on Thursday, petitioner said he was repeatedly told that he "wasn't leaving there until they got what they wanted" (R. 114, 284, 302), and that they were going to make him confess "one way or the other" (R. 114). This kind of questioning certainly suggested "that the questioner has a right to, and expects an answer." *Culombe* v. *Connecticut,* 367 U.S. 568, 574, 81 S.Ct. 1860, 1864, 6 L.Ed.2d 1037 (1961). Clewis had every reason to believe that there might never be an end to the questioning unless he did what the officers wanted him to do. *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, 1770, —— L.Ed.2d —— (1966); *Haynes* v. *Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). In *Culombe,* Mr. Justice Frankfurter wrote:

> "In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingement . . . of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects an answer. This is so, certainly, when the prisoner has never been told that he need not answer and, when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

The state attempts to make a great deal of the fact that petitioner's sister and mother-in-law visited him on Sunday afternoon. The record shows beyond question, however, that petitioner was not allowed to visit alone with these persons, but that the officers were present during the entire interview (R. 174, 218, 352, 379, 421). These people visited with Clewis at the instigation of officer Morales and they encouraged him to agree to take a polygraph test. Officer Morales testified:

> "Q. Did you talk to her before she went up there? A. I might have.
>
> "Q. You told her she ought to get Marvin to take a polygraph test, didn't you? A. Possibly.
>
> "Q. You told her it would help him if he did, didn't you? A. I don't recall saying that.
>
> "Q. You think you might have said that? A. It is possible."

Clewis was denied his request to make a telephone call on Sunday (R. 117). After he signed the first confession on Monday, he was allowed to make a telephone call but testified he was unable to reach the party he called (R. 139-140). His sister was refused permission to see him during all the time he was at the city jail, after Sunday (R. 422). One officer testified that he had a visitor on Monday night (R. 370), but petitioner denied this (R. 312). The only persons that petitioner said visited him were his ex-wife and Mabel Webster (R. 296-297), but he did not remember what day they were allowed to come see him (R. 314-315). Clewis testified that he did talk with a lawyer on Friday morning, after he had made the first two confessions (R. 314). Morales testified that he talked to a lawyer about 7:30 on Thursday morning (R. 388), before Clewis made

the second confession and before he was taken to the Department of Public Safety for further lie detector tests and interrogation.

We submit that these circumstances amount to an incommunicado detention, and that petitioner was not accorded his constitutional rights.

On Tuesday morning, after the interrogation in the sheriff's office began, petitioner again said that he would like to "talk to someone" (R. 235). The deputy sheriff testified that Clewis said he "most of all would like to talk to his boss man . . . and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time." The deputy then called Mr. Mims, the district attorney of Midland County, who came down and talked to petitioner. After that conversation, petitioner orally confessed and his confession was later reduced to writing (R. 95, 153).

This course of interrogation and detention comes within the test set down by this Court in *Culombe* v. *Connecticut*, 367 U.S. 568, 630, 81 S.Ct. 1860, 1894, 6 L.Ed.2d 1037 (1961):

> "Culombe was taken by the police and held in the carefully controlled confinement of police custody for more than four days before he confessed. During that time, he was questioned—questioned every day about the Kurp's affair—and with the avowed intention, not merely to check his story to ascertain whether there was cause to charge him, but to obtain a confession if a confession was obtainable. All means found fit were employed to this end . . . It is clear that this man's will was broken Wednesday night . . . Neither the

Wednesday afternoon nor the Wednesday midnight statement may be proved against Culombe, and he convicted by their use, consistent with the Constitution . . . *When interrogation of a prisoner is so long continued, with such purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained.*" (Emphasis our own.)

The officers admitted at the trial that they had talked to Clewis about making a statement or confession. Ranger John Wood testified (R. 413):

"Q. Well, I understand that: I said, 'What were you trying to get this defendant to do?' A. We were trying to get him to tell us the truth.

"Q. All right, you were trying to get him to make a statement, weren't you? A. We were trying to get him to tell us the truth, yes, sir.

"Q. You never did say anything to him about making a statement? A. Yes, sir, I sure did."

Officer Morales testified (R. 393-394):

"Q. Well, do you remember when you first told him that he ought to make a statement on Monday? A. Oh, it must have been in the afternoon.

"Q. Now, when did you tell him on Thursday that he ought to make a different statement? A. I didn't tell him he ought to. I just told him if he wanted to get the whole truth down, tell us about it."

Officer Reid testified (R. 341):

"Q. What did you say? A. I talked to him, I questioned him, and during the examination I talked to

him and told him to tell the truth about what had occurred.

"Q. To tell the truth about what had occurred. Now, you didn't tell him that for 30 minutes. A. Well, it was more or less a repetitious type of talk that I was going through."

* * * * *

(R. 344):

"Q. Did you tell him you thought he had killed his wife?"

* * * * *

"A. Yes, sir."

* * * * *

"A. All I told him was to tell the truth of what occurred.

"Q. Well, you had to talk to him all those periods of time to tell him to tell the truth? Did you tell him that each time you talked to him? A. Yes, sir, several times."

Ranger Wood testified further (R. 187-188):

"Q. Of course, you all were trying to get a confession from him, weren't you? A. We were trying to get the truth out of him, yes, sir.

"Q. Well, you were trying to get him to sign a statement? A. If he was the guilty party, we wanted one, yes, sir.

"Q. All right, and that was what you were talking to him about, wasn't it? A. That afternoon, yes, sir.

"Q. And did you tell him he ought to sign a statement? A. I don't remember what I told him."

Common sense dictates the conclusion that this uneducated Negro man, who had finished the fifth grade in

school, and who had never before been in trouble with the law (R. 237, 283), would eventually break down under this relentless interrogation. *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957), *Turner* v. *Commonwealth of Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949), *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 180 (1949), *Ward* v. *Texas*, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942), *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), *Blackburn* v. *Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The polygraph examinations in themselves were considerable pressures, exhausting and perplexing and frightening to Marvin Clewis. To this man, this pressure was just as effective as the "truth serum" which was condemned by this Court in *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 77 (1963). This Court said:

> "Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible."

This petitioner certainly had a right to feel that everyone was against him. He testified in answer to the prosecutor's question (R. 317):

> "If you was locked up some place like that and everybody against you, wouldn't you be scared, too?"

Can it be any wonder that petitioner could "see it happening all over again" (R. 153), and that he didn't think he could "go through that kind of punishment again" (R. 307), when confronted by the sheriff's deputies for the third confession? As this Court observed in *Watts* v. *Indiana*, 338 U.S. 49, 53-54, 69 S.Ct. 1347, 1350, 93 L.Ed. 180 (1949):

> "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary . . . This was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

Petitioner testified that he was given no opportunity for "rest periods" Sunday night (R. 132-133), Monday (R. 137), or Tuesday night (R. 145); and there could hardly have been any time on Thursday. The officers testified that he was given rest periods between the interrogations on Monday and Thursday (R. 165, 194, 196, 202, 411), but there is no statement anywhere as to the length of such rest periods. While the interrogation was not continuous in the fashion described in *Ashcraft* v. *Tennessee,* 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 945 (1944), where the evidence showed that Ashcraft was given only one five-minute rest period, this Court gave conclusive effect to Ashcraft's good reputation, to the failure to unearth any clue pointing to his guilt, and to Ashcraft's steadfast denial that he had anything to do with the murder of his wife. All of those things were here present in this case, in addition

to the fact that Marvin Clewis voluntarily drove 300 miles when he heard the sheriff wanted to talk to him. He denied knowing about his wife's death all day Sunday, Sunday night, and Monday until late in the afternoon. It was then that his will was broken, and he became incapable of resisting the pressures of the police. He continued to deny any guilt on Thursday, until the second confession was finally made about 6:00 P.M. He again denied any guilt on Tuesday morning in the sheriff's office. All of these facts are uncontradicted in the Record.

Aside from his confessions, as in *Ashcraft*, there is nothing in this Record which in any way connects Marvin Clewis with the death of his wife. The only evidence which could remotely be considered to constitute anything pointing to his guilt is the testimony of Shirley Jean Judie, the daughter of the deceased, and the testimony of Rachel Garnett, the deceased's mother. Mrs. Judie testified (R. 74-76) that petitioner had threatened Dorothy Mae Clewis, but she did not at any time repeat these threats to the police, although there was ample opportunity to do so (R. 81-82). Rachel Garnett testified (R. 326-331) to several incidents which had happened a year or more before when there had been trouble between Marvin and Dorothy Mae Clewis, but she also never told the police these things (R. 333). Other witnesses testified that Marvin Clewis was good to Dorothy Mae and that they never did have any trouble (R. 71-72, 254, 351).

The forces compelling the first two confessions were still very much present on Tuesday morning when the sheriff's deputies secured the third confession after bringing the district attorney down to talk to petitioner. This is evident by petitioner's testimony (R. 307):

"... I had already been through that once, and those other officers told me the same thing, that nothing was going to happen to me, they wasn't going to do this and they wasn't going to do that, but they did, so they went and got Mr. Mims ... so I was scared because I figured the same thing that those other officers done to me, that they would do the same thing; so I had already signed two statements and I didn't figure it made much difference, because those other officers said they wouldn't beat me or nothing, but they did, so I figured they would do the same thing."

Petitioner had every reason to believe that, unless he complied with the officers' wishes, he would be held and interrogated until he gave them the statements they wanted.

B. *Marvin Clewis was not given proper or adequate food or rest and his basic rudimentary need for these things was disregarded by the police officers preceding the time that defendant signed the first and second written statements. Petitioner was in a weakened condition and was sick, and in such condition that his confessions cannot be deemed to be the product of a rational intellect and free will within the meaning of the decisions of this Court and the Fourteenth Amendment to the Constitution of the United States.*

The testimony of the police officers themselves concerning the lack of food and rest and their total disregard of petitioner's obvious physical condition, is of itself shocking to the sensibilities of men who would like to believe that the Inquisition is forever locked away as a dark chapter in mankind's history. To briefly summarize the evidence on the question of food, rest and physical condition, it must

first be recalled that petitioner left Borger, Texas, about 6:15 P.M. on Saturday and drove 300 miles to Midland. He left Borger as soon as he changed clothes after work (R. 265). He came to Midland and went directly to the sheriff's office, arriving there about 11:30 P.M., where he was questioned until about 2:00 A.M. by deputy Kirksey (R. 265-266). He then went to the home of Elizabeth Johnson and went to bed. He was awakened by Morales at 6:00 A.M. on Sunday morning, and immediately taken to the city police station.

Officer Morales said that he gave Clewis a roll at the police station (R. 377), but petitioner denied this (R. 271), and said he was given nothing to eat at any time that day (R. 272). Officer Morales testified that petitioner did not eat any other time on Sunday (R. 177, 379), and that he was taken from the jail at 7:00 A.M. on Monday without having eaten (R. 111, 177-178, 279). At the Department of Public Safety, the officers testified he was given a Coke at noon (R. 164, 399), but petitioner denied that he was given even that (R. 288). Late in the afternoon, after having been physically abused, he was quoted in the newspaper as having said, "Just bring me some milk and I will give you a statement and sign it." The newspaper reporter testified (R. 225):

> "Q. Now, you wrote in that story that afternoon the details of the statement and the chronological order of the things that happened on Monday previously, and I believe you had a quote in there, 'Just bring me some milk and I will give you a statement and sign it.' Now, did Mr. Clewis tell you that, or one of the officers tell you that? A. I feel certain one of the officers told me that.
>
> "Q. Do you know which one? A. No, sir, I don't."

Petitioner testified he was in pain before the statement was signed on Monday (R. 288):

> "I was sick at the stomach. My stomach was bothering me. I hadn't eaten nothing since that Saturday."

and further (R. 117):

> "I was scared and I was sick and I was hungry, and I just felt I couldn't take no more."

When petitioner signed the statement, he was given some milk (R. 115, 287, 362, 400). Officer Morales admitted that Clewis had nothing to eat from early Sunday morning, around 6:00 A.M., until the milk was given to him when he made the first statement about 6:00 P.M. on Monday (R. 182-183, 383, 385). Petitioner was taken back to the police station about 7:00 P.M. (R. 370). Two officers testified that they stopped and bought petitioner some soup on Monday night, and that he ate it (R. 384, 403). Petitioner denied that he was given anything to eat except the milk late that afternoon (R. 287-288). The officers were aware that petitioner suffered from an ulcer condition (R. 403).

In its reply brief to our Petition for Certiorari, the state at page 10 of its brief makes the statement that petitioner was asked if he wanted a doctor after he was removed to the county jail. This is in error. The inquiry about the doctor came a week before that: on the Monday night just after petitioner had made the first statement, and was at the city jail. Officer Herman Wicker testified (R. 360):

> ". . . I noticed he began to act like he was wanting to vomit, or acted kind of like he was sick, and I asked

him was he all right, and he said, well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything, and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there, and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said 'No.' "

Despite this sickness, petitioner was interrogated Monday night. The officers admitted to interrogating him from 10:00 until 11:00 P.M. (R. 349). It is significant that the officer who testified to the sickness as related above was one of the officers present during this interrogation (R. 349). Petitioner testified he was questioned until long after midnight (R. 119).

Petitioner testified that he was given "a roll and a potato and a slice of bologna" on Tuesday (R. 143), which was the first food he had been given since he was taken to the police station (R. 120).

On Wednesday, petitioner was taken from his cell and put into a car at the police station at 6:55 A.M. (R. 188, 409) with Morales, Wood and a chemist, and taken to Borger, Texas. Officer Morales testified that Clewis ate no breakfast that morning (R. 371), and that the only thing he had to eat was a carton of milk which was given him in Borger (R. 372, 410). One of the officers testified that Clewis was fed milk and crackers on Wednesday night (R. 355). Officer Morales testified that petitioner was given milk Thursday morning (R. 374), while he was

talking to a lawyer, but testified that he did not eat anything else until Thursday night, although he had offered him milk at noon and he had refused it (R. 391).

Petitioner could not have slept more than three to four hours on Saturday night, the time which elapsed between his departure from the sheriff's office and officer Morales' arrival at 6:00 A.M. Petitioner testified that he was questioned until "around 2:00 A.M." on Monday morning, and the officers left the jail with him at 7:00 A.M. on Monday morning to take him to the grave. The officers admitted questioning him until 11:00 P.M. Monday night, and petitioner testified it was long after midnight. On Tuesday morning, he was interviewed by a newspaper reporter who testified that Marvin Clewis was "a very unhappy appearing individual," and he wrote in his story that "Marvin Peterson Clewis, 35 year old Negro pipeline worker, peered through bloodshot eyes early Tuesday after spending a sleepless night in his bunk inside the city jail" (R. 224-225). One of the officers testified that he questioned him on Wednesday night (R. 361).

Marvin Clewis was fed considerably less than the petitioner in *Reck* v. *Pate*, 367 U.S. 433, 441-442, 81 S.Ct. 1541, 1547, 6 L.Ed.2d 948 (1961), where Mr. Justice Stewart said:

> "During the entire period preceding his confessions, Reck was without adequate food, without counsel, and without the assistance of family or friends. . . . He was physically weakened and in intense pain. We conclude that this total combination of circumstances 'is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force

is brought to bear.' *Ashcraft* v. *State of Tennessee,* 322 U.S. 143, 154, 64 S.Ct. 921, 926, 88 L.Ed. 1192."

This Court also condemned the failure to give adequate food and rest to petitioner in *Payne* v. *Arkansas,* 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958).

There was no place for Marvin Clewis to rest or sleep at the Department of Public Safety (R. 390-391). Petitioner testified that he was unable to sleep Sunday night, even after the questioning ended, because "My stomach was hurting and I was hungry and I was also tired" (R. 279). On both Monday and Thursday, he was subjected to polygraph tests, which was a wearing experience in itself, aside from the continual questioning to which he was subjected. This evidence readily demonstrates that Marvin Clewis was absolutely exhausted late Monday when he finally signed the first written "confession." He was simply not capable of making a statement which can be considered reliable. The officers testified that he was "sick" and "acted like he was wanting to vomit" after he came back to the police station following the first statement (R. 360). This man was in no condition to make any kind of statement at all on Monday.

This Court has said, in *Watts* v. *Indiana,* 338 U.S. 49, 53, 69 S.Ct. 1347, 1349, 93 L.Ed. 180 (1949):

> "Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant . . . as part of the total situation out of which his confessions came and which stamped their character."

In his concurring opinion, Mr. Justice Douglas aptly observed:

> "It would be naive to think this custody was less than the Inquisition. The man was held until he broke. Then and only then was he arraigned and given the protection which the law provides all accused."

The State contends, and the officers contended at the trial, that petitioner was "offered" food, and that he had "opportunity" to sleep and rest. If, as this Court has so often stated, the ultimate question is whether the confession was the "product of a rational intellect and a free will" and "whether the defendant's will was overborne", then the fact that petitioner here was "offered" food or had the "opportunity" for sleep and rest, cannot be of constitutional significance. The question must inquire as to whether or not the defendant was *capable* of making a confession, and the above cases seem to hold that a defendant who has not had adequate food or rest cannot be capable of making a confession. The petitioner has denied that he was offered any food at the pertinent times, and that he had any significant amount of rest, and, of course, it is his word against that of officers of the law. There is, however, no question but that he did not have any food from Sunday morning until Monday night except for a Coke at noon and some milk late in the afternoon Monday when he signed the first statement. There is also no question about his being sick just a short time after making the first statement. The question must, in the final analysis, boil down to this: What was his *actual* physical and mental condition at the time he confessed?

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein* v. *New York*, 346 U.S. 156, 185, 73 S.Ct. 1077, 1093, 97 L.Ed. 1522 (1953).

This uneducated Negro, faced with the awesome powers of those whose prisoner he was, suffering from lack of sleep, lack of food, being constantly interrogated, sick—all of these are overpowering forces to such a person, cut off as he was from family and friends in the coercive environment of three separate police strongholds.

As this Court pointed out in *Davis* v. *North Carolina*, —— U.S. ——, 86 S.Ct. 1761, 1767, —— L.Ed.2d —— (1966):

> "We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne* v. *State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and, therefore, his ability to resist."

In that case, Davis was fed two sandwiches twice a day, occasionally supplemented with peanuts and other "stuff." That was far more sustenance than Marvin Clewis was given at any time while he was confined in the Midland police station or the Department of Public Safety or the jail in Borger, from Sunday morning until Friday morning. His ability to resist was undoubtedly affected significantly by his lack of food and rest.

Petitioner was fed after he was transferred to the Midland county jail on Friday (R. 305), and he made no complaint about food and rest after that. However, it would be naive to think that his previous experience when he was denied food and rest was not the determining factor in his decision to go ahead and get it over with

when the deputies and the district attorney, Mr. Mims, talked to him about giving the third confession. As he testified (R. 307): "I didn't think I could go through that kind of punishment again."

C. *During the lengthy and prolonged interrogation by police officers, petitioner was never advised of his absolute right to remain silent and to refuse to answer, at a time when his commitment to custody seemed to be at the will of his questioners and he had every reason to believe that he would be held and interrogated until he spoke. No warning was given him prior to any oral confessions, or prior to his signing of the first two confessions, and the third written statement was preceded by a warning given him in general terms by the interrogating law enforcement officers.*

Nowhere in this voluminous record is there any testimony that this defendant was apprised of his right to remain silent or was given a warning of any kind at any time Sunday, or on Monday, prior to the making of the first written statement, or at any other times preceding the Thursday confession. Rather, the contrary most convincingly appears. The facts are clear and undisputed with reference to the interrogation and confession: The officers were determined to get a confession from Marvin Clewis (R. 179, 187-188, 199, 200, 344, 382-383, 393-394, 413). See excerpts from testimony of Ranger Wood, officer Morales and officer Reid, at pages 40, 41 and 42, this Brief. Petitioner repeatedly denied any guilt on Sunday and Monday (R. 104, 105, 107, 191, 211, 269, 274, 276, 317, 341). Petitioner continued to deny his guilt on Thursday at the Department of Public Safety prior to the taking of the second confession (R. 125, 197, 302). He also denied any

guilt on Tuesday, July 17, during the interrogation at the sheriff's office (R. 232).

This overzealous conduct of the officers and their treatment of petitioner hardly indicates an atmosphere in which the officers would have troubled to advise petitioner of his right to remain silent, or of his right to counsel. To the contrary, he was induced by officers and kin to submit to polygraph tests (R. 169-170), was accused of killing his wife over and over, and was subjected to the many pressures detailed above. Consideration must be given to that conduct and to the manner in which petitioner was dealt with. He was awakened at 6:00 A.M. on Sunday by officer Morales and taken to the police station; he was not allowed to visit alone with his sister, his mother-in-law and Elizabeth Johnson when they came to see him on Sunday; officer Morales had talked to those three persons and "possibly" told them that they should tell Clewis to take a polygraph test, and that it would help him; he was taken to the grave where the bones had been excavated at 7:00 A.M. on Monday; he repeatedly denied any guilt, as set forth above; he testified that he was told that he wasn't leaving the Department of Public Safety Building until he signed a confession (R. 114, 284, 302); he was admittedly questioned at night, and subjected to relentless interrogation from Sunday until late Thursday; he was not taken before a magistrate until 8:00 P.M. Monday night, after he had signed the first confession (R. 173-174); he was refused permission to make a telephone call Sunday (R. 117); he was not delivered to the sheriff of Midland County, Texas, as the warrant commanded until Friday afternoon, July 13 (R. 231, 389); and he was permitted to talk to no one except the officers and the district attorney during the interrogation on the following Tuesday morning.

As pointed out in the brief for the state (Br. 8), there is no testimony concerning any warnings given petitioner at any time during the Sunday through Friday interrogations. There is no testimony that he was warned, and no testimony that he was not, but the facts detailed above certainly indicate a situation in which he was not advised of his right to remain silent or of his right to counsel. This warning is just as necessary before an oral confession as it is before a written statement. *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). According to this Record, the only time petitioner was ever warned that he did not have to make any statement at all was just prior to the third written confession which was introduced in evidence (R. 230). This warning was made in general terms by the deputy sheriff, and there is no evidence that he was warned at the beginning of the interrogation or advised of his rights. Petitioner submits that it is quite obvious from all the testimony that no warnings were in fact ever given to petitioner during any other interrogation. The warning was, of course, of no effect in the third, because the forces compelling the first two were still very much present. *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). Petitioner testified (R. 153):

> "They went and got Mr. Mims, and when they went and got him, why, I was scared, because I could see it looked like the same thing happening all over again, that three or four days of abusing, and I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement because I had already made two statements and I didn't figure it made any difference. I had signed two."

The conduct of the officers in this case amounted to "horse-shedding of the accused at the intermittent pleasure of the police until confession was forthcoming" which was condemned by Mr. Justice Frankfurter in his concurring opinion in *Fikes* v. *Alabama,* 352 U.S. 191, 199, 77 S.Ct. 281, 285, 1 L.Ed.2d 246 (1957). The conduct of the officers was hardly consistent with any concern for petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

In *Malloy* v. *Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 1494, —— L.Ed.2d —— (1964), the Court, speaking through Mr. Justice Brennan, said:

> "The American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently secured, and may not by coercion prove a charge against an accused out of his own mouth."
>
> * * * * *
>
> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence."

Petitioner testified that he answered the questions while he was giving the statement "the way I figured he wanted me to" (R. 287). He further testified (R. 287):

> "Well, in some things he'd ask me, 'Did it happen that way?' and I figured that's the way he wanted it to happen, so I said, 'Yeah.'"

This demonstrates that officer Morales was, in fact, author of these statements.

Nor was the Tuesday formal warning sufficient, in the light of the history of petitioner's interrogation. As Mr. Justice Douglas said in *Haley* v. *Ohio,* 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1947):

> "We cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain."

And, in *Haynes* v. *Washington,* 373 U.S. 503, 513, 83 S.Ct. 1336, 1343, 10 L.Ed.2d 513 (1963), the Court again dealt with the situation where formalized warnings were given:

> "Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness (by the defendant in his statement). Certainly, we cannot accord any conclusive import to such an admission. . . . "

These cases provide the background for the rule set forth in the Court's opinion in *Miranda* v. *Arizona,* —— U.S. ——, 86 S.Ct. 1602, 16—, —— L.Ed.2d —— (1966):

> "In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrim-

> ination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forego his Fifth Amendment privilege." 86 S.Ct. 1602, 1640.

See also *Davis* v. *North Carolina*, —— U.S. ——, 86 S.Ct. 1761, 1763, —— L.Ed.2d —— (1966), where this Court refused to infer a waiver of petitioner's rights from the record, which showed that Davis was repeatedly interrogated and that he denied the offense prior to the time he finally confessed.

The failure to apprise this defendant of his rights under the Fifth Amendment to the Constitution of the United States—to remain silent until and unless he should choose to speak—was but another circumstance which rendered his confessions involuntary under the Fifth Amendment to that Constitution, as extended to the states by the Fourteenth Amendment.

D. *Petitioner was never advised of his right to counsel, and was not represented by counsel during the interrogation or at the time the "confessions" were signed.*

The trial of this case was begun some six weeks prior to June 22, 1964, the date of this Court's decision in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977

(1964), and therefore, petitioner may not rely on that decision. *Johnson* v. *New Jersey,* —— U.S. ——, 86 S.Ct. 1772, 1781, —— L.Ed.2d —— (1966). In *Johnson,* however, the Court said at page 1779:

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing, of course, that the procedural prerequisites for direct or collateral attack are met . . . Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years . . . Thus, while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

And, in *Davis* v. *North Carolina,* —— U.S. ——, 86 S.Ct. 1761, 1764, —— L.Ed.2d —— (1966), this language appears:

> "The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that the defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the voluntariness of statements later made. This factor has been recognized in several of our prior decisions dealing with standards of voluntariness."

The Texas Court of Criminal Appeals distinguished *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) on the ground that petitioner had not requested counsel (R. 445). Despite the prospective application of the *Escobedo* rule, this holding is obviously in error. *Carnley* v. *Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); *Miranda* v. *Arizona*, —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966). Although the question is now moot, in the light of the decision of this Court in *Miranda* v. *Arizona*, —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966), and *Johnson* v. *New Jersey*, —— U.S. ——, 86 S.Ct. 1772, —— L.Ed.2d —— (1966), the circumstance that Marvin Clewis was not apprised of his right to counsel and was not represented by counsel at any time during the interrogation, gives weight to the involuntariness of all three confessions.

The Court of Criminal Appeals of Texas, in both its original opinion (R. 444) and its opinions on rehearing (R. 462, 473), makes much of the fact that Marvin Clewis "talked with a lawyer" during his confinement. The testimony is conflicting as to just when petitioner did talk with the attorney, H. S. Harris, Jr. Sgt. Morales testified for the state that petitioner talked with a lawyer on Thursday morning before being taken to the Department of Public Safety for the all-day interrogation which resulted in his subsequent confession there (R. 374, 388). Petitioner testified that he talked with the attorney after he had made the first two statements, but that the attorney did not represent him and did not give him any advice (R. 154-156, 314). Petitioner's sister testified that she asked the lawyer to go see the petitioner, but that the lawyer did not take petitioner's case and that she could not raise the money

to retain him (R. 422-423). The lawyer did not tell either the police or the sheriff's department at any time that he represented Clewis (R. 388, 236-237). Merely talking with a lawyer about his fee cannot serve as a substitute for advice about his rights.

If the lawyer had in fact represented petitioner, it is difficult to believe that he would have permitted the police to take him the same day to the Department of Public Safety and again subject him to a day-long interrogation —and yet this is what occurred, if the testimony of the officers is to be believed. The lawyer did not at any time take any steps to protect petitioner, he did not give petitioner any advice, and it is self-evident that he was not representing him. Petitioner's subsequent actions were not those of a man who was represented by an attorney, who had been given any advice, or to whom had been explained his constitutional right to counsel.

Petitioner did ask to "talk to someone" before giving any statement (R. 235). Gene Howell, the deputy sheriff who took the statement, testified (R. 235):

> "Q. All right, sir, did he make a request to you concerning a telephone call— A. Yes, sir.
>
> "Q. —to see someone? A. Yes, sir, he said he would like to talk to someone.
>
> "Q. What happened then? A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.
>
> "Q. All right, what happened? A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long-distance call to

that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time."

This same witness testified (R. 236) that petitioner did not have a lawyer, to his knowledge.

Failing to contact petitioner's "boss man" on the telephone, the deputy sheriff then called the district attorney, Mr. Mims, who came down and talked with petitioner (R. 233). This conversation certainly cannot be deemed as satisfying the constitutional requirement that petitioner be afforded counsel, nor can it by any stretch of the imagination serve to be considered a sufficient compliance with the requirement that petitioner's constitutional rights be explained to him.

We submit that, under this Record, it is obvious that petitioner's right to counsel was not explained to him and that he was never represented by counsel at any time prior to making these three confessions. It is uncontroverted in the Record that petitioner did not talk with counsel prior to the first confession. If the position be taken that Clewis was represented by counsel before the second or third confessions, then we submit that those confessions are void because counsel was not present when they were taken.

Moreover, petitioner was not represented by counsel at the preliminary hearing (R. 289). Legal aid and advice were most critical to petitioner in these circumstances at that hearing. Had an examining trial been demanded (as competent counsel would have done), petitioner would have been released and could not have been convicted, because the confession was undoubtedly inadmissible. At

the very least, the prosecution would have been required to disclose the contents of the first confession—a vital element in preparing petitioner's defense.

Had an examining trial been conducted, petitioner's counsel would have been entitled to cross-examine all of the witnesses. The fact of his arrest without probable cause would have been developed, and petitioner should have been discharged at any such hearing. Although this Court, in *Pointer* v. *Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, reserved the question as to whether or not the preliminary hearing in Texas is so critical to the defendant as to call for appointment of counsel at that stage, we earnestly submit that in this case legal aid and advice were most critical to petitioner. *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 1202. The language of Mr. Justice Goldberg in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), is most applicable to describe petitioner's situation at the time of the examining trial:

> "It was a stage surely as critical as was the arraignment in *Hamilton* v. *Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, and the preliminary hearing in *White* v. *Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193. What happened at this interrogation could certainly 'affect the whole trial,' *Hamilton* v. *Alabama, supra,* since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' Ibid. It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment.

> Petitioner had, for all practical purposes, already been charged with murder."

Substituting the words "examining trial" for the word "interrogation" in the above reference, makes this quotation apply with tremendous force to the situation in which Marvin Clewis found himself on Monday night. In these circumstances, if counsel had been appointed and had demanded an examining trial, petitioner would have been released and would never have been tried for the offense for which he now stands convicted. Under the rules set forth in *Miranda* v. *Arizona,* —— U.S. ——, 86 S.Ct. 1602, —— L.Ed.2d —— (1966), this question may be settled for the future. Petitioner, however, cannot take advantage of that decision.

Here was a most vital step in the proceedings against him when petitioner needed the "guiding hand of counsel" to protect him. *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Petitioner did not understand the proceedings, and testified, concerning his appearance before the Justice of the Peace (R. 116):

> "Q. What happened down there? A. Well, I don't know; signed some papers and read something off. I didn't understand it. They said they was charging me with murder with malice, or something, the way they had it.
>
> "Q. Do you remember whether or not the Justice of the Peace said anything to you—incidentally, was there a Justice of the Peace down there? A. I guess so; I don't know him.
>
> "Q. Well, anyway, the man in charge of it, did he say anything to you about whether or not you wanted

to waive an examining trial, or anything like that, or do you remember? A. No, sir, I don't remember if he did. He might have said it, but I don't remember that."

See also petitioner's testimony at R. 289. The state did not at any time establish that petitioner had waived an examining trial, and his testimony is not controverted in that respect. We submit that Marvin Clewis could not have intelligently waived an examining trial, and that he was clearly entitled to the help of a lawyer. He was entitled to be confronted with the witnesses, and with the contents of the statement, all of which could have been done if a lawyer demanded an examining trial as provided under the laws of Texas. Article 245, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provided, at the time of this trial:

"When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

Article 250, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provides:

"If any person appear to prosecute as counsel for the state, he shall have the right to question the witnesses on direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the state or for the defendant, the magistrate may examine the witnesses; and the accused has the same right."

And, Article 251, *Vernon's Texas Annotated Code of Criminal Procedure* (1925) provides that "The same rules of evidence shall apply to and govern the trial before an examining court that apply to and govern a final trial."

While we are unable to cite any case where a previous written statement has been introduced at an examining trial, it is obvious that the state could produce no other evidence at the examining trial which would authorize the magistrate to bind petitioner over to the Grand Jury on the charge which had been filed against him. According to Morales, the bones had not yet been identified as being the remains of Dorothy Mae Clewis (R. 173). There was certainly no evidence that death had been caused by any criminal agency, and there is no such evidence anywhere in this Record which existed either Monday night or to this very day. No information had been given to the police about any threats or the kind of trouble which Shirley Jean Judie and Rachel Garnett testified to at the trial. The state had no evidence other than the confession, and it necessarily would have been introduced.

Had counsel been present, he could have placed in the Record the testimony given at the trial showing that this defendant had been deprived of food and rest, had been physically assaulted, and had been subjected to prolonged interrogation and incommunicado detention. The fact of his illegal arrest without probable cause would have been established. Under those circumstances, we submit that the proper court could have and would have discharged this defendant. This was certainly "a vital step in the proceedings against him."

Later, in this Brief, we shall deal with the failure of the police to remand petitioner to the custody of the sheriff of

Midland County, Texas, as required by the warrant and by Article 261 and Article 264, *Vernon's Texas Annotated Code of Criminal Procedure* (1925), which provide:

> "After the examining trial has been had, the magistrate shall make an order committing the defendant to the jail of the proper county, discharging him or admitting him to bail, as the law and the facts of the case may require."
>
> "A commitment is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed . . . "

Petitioner would have received the further benefit of Article 265, *Vernon's Annotated Texas Code of Criminal Procedure* (1925):

> "Every sheriff shall keep safely a person committed to his custody. *He shall use no cruel or unusual means to secure this end,* but shall adopt all necessary measures to prevent the escape of a prisoner . . . " (Emphasis our own.)

Officer Morales testified (R. 389), that it was not the practice of Midland police officers to deliver the custody of a prisoner such as Clewis to the sheriff following the examining trial, even though the warrant commands that this be done, and Texas law requires it.

Had counsel been appointed for Marvin Clewis at this stage of the proceedings, Marvin Clewis would not be before this Court today. This was a very critical stage to Marvin Clewis.

E. ***Petitioner, following his arrest without a warrant and without probable cause, was not immediately taken before a magistrate as required by the laws of the State of Texas and by the Constitution of the United States. Petitioner was illegally detained and subjected to prolonged interrogation over a period of 38 hours following his illegal arrest, and had signed a confession prior to the time he was taken before a magistrate. Thereafter, the police officers detained him illegally, in violation of state law which required that petitioner be delivered to the custody of the sheriff of Midland County, Texas.***

Articles 212-215, *Vernon's Annotated Texas Code of Criminal Procedure* (1925), detail the instances in which a person may be arrested without a warrant, and Article 217, *Vernon's Annotated Texas Code of Criminal Procedure* (1925) provides:

> "In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order."

Officer Morales testified that he did not have a warrant when he took Clewis into custody at 6:00 A.M. Sunday, and that he knew that he did not have sufficient grounds to secure a warrant for his arrest (R. 170-171, 375). He testified that he had taken him to the police station for investigation of two Missing Persons Reports (R. 377-378), although Dorothy Mae Clewis had been reported missing nearly six months earlier (R. 377). Marvin Clewis lived in Midland for three months after that Missing Persons Report was filed, and was in Midland frequently—yet

officer Morales had never before contacted him. Petitioner was locked up at 8:00 A.M. on Sunday, according to the testimony of officer Morales (R. 172).

Petitioner had driven 300 miles and voluntarily gone to the sheriff's office at 11:30 P.M. the night before, where he was interrogated until about 2:00 A.M. (R. 56, 155). He was then released, but was told to come back to the sheriff's office the following morning (R. 57). Under these circumstances, there could have been no question that petitioner was "about to escape," and there was ample time to procure a warrant for petitioner's arrest (Article 215, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). Petitioner had committed no felony or breach of the peace in the presence of anyone, nor was he about to commit some offense (Articles 212, 213 and 214, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). Yet, officer Morales did not take petitioner before a magistrate until 8:00 P.M. Monday, 38 hours after he took him into custody (R. 173-174, 384, 419). He had been in continuous custody since his arrest (R. 174), and had been subjected to prolonged periods of interrogation on Sunday, Sunday night, and all day Monday beginning at 7:00 A.M.

Officer Morales testified that it was not the practice of the Midland Police Department to take a man directly to a magistrate (R. 385).

Had petitioner been taken immediately before a magistrate, no warrant would have issued for his arrest and he would have been discharged. On Sunday morning, there was absolutely no evidence which would have justified holding this petitioner. The deputy sheriff who interrogated him after his voluntary appearance Saturday night knew

this and released him, but asked him to come back the following morning to talk to the sheriff. Beyond any question, there existed no legal grounds upon which this defendant could be held in custody on Saturday night or at 6:00 A.M. Sunday morning when Morales got him out of bed and took him to jail. Petitioner would have been discharged by any magistrate. Knowing this to be true, officer Morales, nevertheless, decided to take the law into his own hands, and began the long in-custody interrogation and coercive conduct which resulted in the Monday night confession. Only then did they take petitioner before a magistrate.

This Court has long condemned the failure of an arresting officer to take his prisoner immediately before a magistrate, before any interrogation is commenced.

In *Ward* v. *Texas,* 316 U.S. 547, 552, 62 S.Ct. 1139, 1142, 86 L.Ed. 1663 (1942), this Court considered the Texas statutes requiring that any person arrested without a warrant be taken immediately before the nearest magistrate. The conviction was reversed because the officers did not comply with the law. In *Fikes* v. *Alabama,* 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957), the Court considered the fact that Fikes was denied the protections afforded to a prisoner upon a preliminary hearing under Alabama law, as a part of the "totality of the circumstances" which made his confession inadmissible. To the same effect, see *Reck* v. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Turner* v. *Pennsylvania,* 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810; *Haynes* v. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).

The law required that defendant be taken before a magistrate. This was not done. Had the law been complied with,

there would have been no confession because petitioner would have been discharged. He could then have consulted freely with family and friends and could have obtained legal counsel. Petitioner was illegally arrested, without probable cause, by an officer who had taken no part in the investigation of the case for which he was held and who was in possession of absolutely no facts which indicated any guilt on the part of petitioner. The essentials of a criminal offense had not been established, and the victim whose remains were found outside the city limits of Midland had not been identified. This combination of facts demonstrates the denial of defendant's constitutional rights in this case, and this is a compelling circumstance, illustrating the involuntary character of the confessions elicited from petitioner.

F. *Petitioner was physically assaulted, threatened, cursed and abused by the officers prior to making the first and second confessions, constituting a denial of due process.*

Each of the officers who testified in this case denied that any physical abuse had been inflicted on petitioner, or that any threats were made. Clewis testified that he was struck, cursed and threatened by the officers on Monday (R. 112-115, 282-285). Much of his testimony has been detailed at pages 17-18, 22 and 23 in the "Statement" portion of this Brief. He testified to being threatened Wednesday on the trip to Borger (R. 300-301), and while he was in Borger (R. 308). He further testified to being physically and verbally abused on Thursday (R. 125-126, 303-304), and testified that following such day-long abuse and questioning (R. 304):

"Well, I was tired and I just felt like I couldn't take no more, so I just went on and gave them a statement, and I was hurting so I didn't figure I had no choice."

The first confession was signed late Monday, and the second confession was signed late Thursday. Petitioner had denied any guilt on both those dates (R. 104, 105, 107, 125, 191, 197, 211, 269, 274, 276, 302, 317, 341).

Although he denied that he threatened petitioner, Ranger Wood would only respond that "I don't remember what I told him" (R. 188) on Monday and again on Thursday (R. 189).

There was corroborating evidence of petitioner's claim of physical abuse, cursing and threats on the parts of these officers. Deputy Sheriff Gene Howell testified that the petitioner told him that these same three officers—Sgt. Morales, officer Reid, and Ranger Wood—had assaulted him physically, threatened, and abused him (R. 95-96, 233-234). This witness testified that Marvin Clewis told him these things "reluctantly" (R. 96, 235). Wayne Taylor, assistant chief of police, testified that "There had some word got back to us that had been put out that he said he had been mistreated" even before the Thursday interrogation at the Department of Public Safety (R. 396-397). Taylor testified (R. 396) that Clewis told him on Thursday that he had not been mistreated. In addition, petitioner "acted like he was wanting to vomit, or acted kind of like he was sick" (R. 360), which corroborates his testimony that the polygraph operator "hit me in the stomach" and knocked him out of the chair (R. 304).

It is, of course, settled under the decisions of this Court that any sort of physical assault upon a prisoner is a denial of due process. *Brown* v. *Mississippi,* 297 U.S. 278,

56 S.Ct. 461, 80 L.Ed. 682. Mr. Justice Frankfurter wrote in *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957):

> "If this record had disclosed an admission by the police of one truncheon blow on the head of petitioner, a confession following such a blow would be inadmissible because of the Due Process Clause."

This principle is so well settled that citation of authorities is both tiresome and unnecessary. Although the testimony of physical abuse and threats is contradicted by the officers, petitioner's testimony appears in these circumstances to be very believable, when considered in context with the other undisputed circumstances of his treatment at the hands of the police. Particularly is this so when the testimony corroborating that abuse—which testimony was given by the state's witnesses—is considered.

This is but another of the many coercive circumstances which, taken together, render any confessions made by petitioner inadmissible because involuntary.

G. *Petitioner was moved from jail to jail and was incarcerated in one jail more than 300 miles from Midland, Texas; and in another building outside the city limits of Midland, Texas, in addition to the city police station, during the period of his incommunicado detention and prolonged interrogation.*

The practice of moving a prisoner during interrogation from jail to jail has been condemned by this Court. *Ward* v. *Texas*, 316 U.S. 547, 555, 62 S.Ct. 1139, 1143, 86 L.Ed. 1663 (1942); *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961).

Petitioner was confined in the city jail in Midland, Texas, from 6:00 A.M. Sunday until 7:00 A.M. Monday morning. He was then taken to the "grave" where the remains were found, and he testified that he was questioned at that place, which was two miles outside the city limits of Midland, Texas (R. 110). He was then taken to the Texas Department of Public Safety, which is outside the city limits of Midland, Texas, and was interrogated there all day. He was confined in a little room in which there was only one chair and an ashtray (R. 390-391). He was required to sit in that chair, and any interrogating officer would have been standing over him. On Wednesday, petitioner was taken from the police station at 6:55 A.M. (R. 188, 409). He was then driven by automobile to Borger, Texas, a distance of 300 miles (R. 188, 371, 409-410), in the company of Ranger Wood, officer Morales and a chemist for the Department of Public Safety, all of whom questioned him during the trip (R. 121, 365, 386, 414). This trip consumed the entire day, and Clewis was locked up in the Borger jail for a period of time (R. 300, 416). He was again taken from the police station and taken to the Department of Public Safety on Thursday morning, where he remained all day and was subjected to almost continuous interrogation.

In *Ward* v. *Texas, supra,* Mr. Justice Byrnes said:

> "The effect of moving an ignorant negro by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously is evident from petitioner's statement to County Attorney Rolston that he would be glad to make any statement that Rolston desired. Disregarding petitioner's claims that

> he was whipped and burned, we must conclude that this confession was not free and voluntary but was the product of coercion and duress, that petitioner was no longer able freely to admit or to deny or to refuse to answer, and that he was willing to make any statement that the officers wanted him to make."

The shuttling back and forth between the police station and the Department of Public Safety Building, the "ride out in the country" on which Morales testified he took Clewis Monday morning, and the trip to Borger and incarceration there are definitely circumstances to be considered in determining the voluntariness of petitioner's confessions. It is understandable why petitioner "didn't figure I had no choice" (R. 304) on Thursday and "it looked like the same thing happening all over again" (R. 153) when the Tuesday interrogation began.

2.

Petitioner's Confession Was Inadmissible and There Was a Denial of His Rights Guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States, When He Was Arrested Without a Warrant and Without Probable Cause by an Officer Who Possessed No Authority Over the Case and Was in Possession of No Facts Which Could Justify Petitioner's Arrest. Petitioner's Confessions Were the Fruits of Such Unlawful Arrest.

When police officer Morales woke petitioner at 6:00 A.M. on Sunday morning, July 8, 1962, and took him to the police station, he did not have a warrant for his arrest (R. 170-171, 375), and knew that sufficient grounds did not exist for him to have procured a warrant for his arrest. Officer Morales testified (R. 170-171):

"Q. And if you had wanted to see him, you would have come down here to somebody and gotten a warrant and gone out there and got him, wouldn't you? A. If I had sufficient grounds to get a warrant.

"Q. Why didn't you do that? Why didn't you get a warrant? A. I just answered that question."

As we have stated before, the human bones had been discovered three days previously, outside the city limits of Midland, Texas, at a place wholly outside the jurisdiction of the Midland Police Department (R. 43, 171, 376). The Midland County Sheriff's Department had begun and was pursuing its investigation, and no assistance from the city police or officer Morales had been requested (R. 43, 58, 171, 376). The bones had not yet been identified (R. 173), and there was no evidence that death had been caused by means of any criminal agency. Morales was in possession of no facts which connected petitioner with the crime, if in fact any crime had been committed.

Marvin Clewis had been working in Borger, Texas, a distance of 300 miles from Midland (R. 265). A deputy sheriff had left word with his sister that the sheriff's department would like to see Marvin Clewis if and when he arrived in Midland (R. 58). The deputy was aware that Clewis was working in Borger (R. 56). Elizabeth Johnson had called petitioner in Borger by long distance telephone on July 6 and told him that a body had been discovered and that there was some talk that it might have been Dorothy's body (R. 264). The next day, Saturday, when Clewis got in from work, his sister called him long distance from Midland and told him that the sheriff's department wanted to talk to him, whereupon petitioner changed clothes and left immediately for Midland (R. 265). After driving

300 miles, petitioner voluntarily reported to the sheriff's office about 11:30 P.M. and was questioned by a deputy sheriff, the witness Kirksey, until 1:30 or 2:00 A.M. Sunday (R. 55, 102). Deputy Kirksey testified that he told Clewis to go on home, but that he was to come back to the sheriff's office at 8:00 o'clock on Sunday morning (R. 57), doubtless aware that he had no evidence on which Clewis could be held.

After Morales took petitioner to the police station and locked him up early Sunday morning, he began the day-long interrogation which resulted in petitioner's agreement to take a polygraph test. No complaint was filed against petitioner, and he was held without a warrant and without being taken before a magistrate until 8:00 P.M. Monday (R. 174, 419). Without an examining trial, petitioner's bond was set and he was then returned to the police station instead of being delivered to the custody of the sheriff of Midland County, Texas, as the law requires (Articles 261, 263, 264, *Vernon's Annotated Texas Code of Criminal Procedure,* 1925). The officers continued to subject him to prolonged interrogation and incommunicado detention until the following Friday when, after having made two confessions in writing—which confessions were contradictory—he was finally delivered to the custody of the sheriff of Midland County, Texas (R. 231). He was also thereafter put in jail in Borger, Texas (R. 300, 416), and was incarcerated in both the city police station and at the Department of Public Safety Building outside Midland, Texas.

Articles 212-215, *Vernon's Annotated Texas Code of Criminal Procedure* (1925) enumerate the instances where

arrests may be made without a warrant. These statutes provide that arrest without a warrant may be made when a felony or offense against the public peace is committed in the presence of an officer or any other person; when a felony or breach of the peace has been committed in the presence of or within the view of a magistrate and such magistrate verbally orders the arrest; of persons found in suspicious places and under certain circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit an offense; and when it is shown by satisfactory proof to a peace officer, upon representation of a credible person, that a felony has been committed and that the offender is about to escape, so that there is no time to procure a warrant.

None of these circumstances obtained here. The defendant had voluntarily driven 300 miles to talk to the deputy sheriff. He went directly to the sheriff's office when he arrived in Midland. There was no evidence of any kind to connect him with any offense. The bones which had been dug up had not yet been identified. Petitioner was not in suspicious places or threatening to commit any offense. There could be no question that he was about to escape, and there was ample time to have procured the issuance of a warrant for his arrest.

There was no justification for petitioner's arrest, and that arrest was made in violation of the laws of the State of Texas by an officer who prior to that time had not participated in any criminal investigation of the remains found northwest of the city and outside the city limits.

Undoubtedly, this arrest is condemned by Mr. Justice Brennan's language in *Wong-Sun* v. *United States*, 371

U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) where this language appears (371 U.S. at 481-482, 83 S.Ct. at 414):

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. Cf. *Jones* v. *United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy."

Certainly, officer Morales had taken the law in his own hands when he arrested petitioner on that Sunday morning. No warrant could have issued on the facts in his possession, and he was not entitled to transform "vague suspicion . . . into probable cause for arrest" by reason of his own conduct. As was said in *Wong-Sun* v. *United States, supra*:

> "That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up."

By the same token, an arrest unlawful at its inception may not be validated by a confession later secured. Mr. Justice Brennan went on to say:

> "The history of the use and not infrequent use of the power of arrest cautions that a relaxation of the fun-

damental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice. *Brinegar* v. *United States,* 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 . . . The threshold question in this case, therefore, is whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy. We think that no warrant would have been issued on evidence then available" (371 U.S. at 479-480, 83 S.Ct. at 413).

When that test is applied to the facts in this case, it is obvious that no warrant could have issued for the arrest of Marvin Clewis. The officer himself knew this (R. 170-171) and nothing in the Record contradicts it. We have contended that the exclusionary rule of *Wong-Sun* vitiates any confessions which petitioner made following his unlawful arrest and illegal detention. The Court of Criminal Appeals, in its opinion of November 10, 1965 (R. 461), held:

"2. As we construe the opinion in *Collins,* it is not authority for the holding that *Wong-Sun* v. *U.S.,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407, is applicable to state court trials."

In its amended opinion overruling our Motion for Rehearing, dated January 5, 1966, the Texas court substituted the following paragraph for the one quoted above (R. 472):

"2. The decision of the majority in *Collins* was based on the involuntariness of Collins' confession as a matter of law. The resolution of Collins' claims with re-

gard to *Wong-Sun* v. *U.S.*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407, was attempted only by Chief Judge Tuttle, whose opinion also found the confession to be involuntary. Viewed in this light, we do not find *Collins* determinative of the appellant's claim under the exclusionary rule of *Wong-Sun*."

The Texas Court of Criminal Appeals was referring to the decision of the Fifth Circuit in *Collins* v. *Beto*, 348 F.2d 823 (5th Cir., 1965), in which both Chief Judge Tuttle and Judge Friendly held that the exclusionary rule of *Wong-Sun* applied to the facts in that case. Briefly stated, the facts were these: Collins was arrested at 7:30 P.M. on January 19 at his home, without a warrant. One of the officers testified that they "didn't feel justified in charging the man with an offense of that kind . . . on the basis of the information we had" (348 F.2d 823, 824-825). He was taken to Texas Ranger Headquarters in the same city, where there was no serious questioning. At midnight, he was taken to a jail in Humble, Texas, and charged with the offense of vagrancy. A complaint was filed and a warrant issued under a false name. Collins was placed in jail but was not questioned again until January 20 in the afternoon, when he was returned to Ranger Headquarters in Houston and the questioning began around 7:00 P.M. After interrogation consuming only one hour and fifteen minutes, Collins confessed orally. That confession was then reduced to writing, being completed about midnight. The officers found that statement unsatisfactory and in the early morning hours of January 21, they gave him two lie detector tests and questioning recommenced. Shortly thereafter he confessed again orally, and the second state-

ment was then reduced to writing. After signing it, he was taken before a justice of the peace and formally charged.

That case was decided prior to this Court's decision in *Beck* v. *Ohio*, 85 S.Ct. 223, 379 U.S. 89. The Court nevertheless held that the exclusionary rule of *Wong-Sun* applied in *Collins* v. *Beto*. Chief Judge Tuttle said (348 F.2d 823 at 827):

> "The only information offered as supporting Collins' arrest in this case, E. T. Morgan's 'tip', clearly does not meet the test, and the State law enforcement officers knew it. Even if Collins was not deprived of his constitutional rights when he was taken into custody at his home on the evening of January 19th, there can be no doubt that he was so deprived when he was locked up in the Humble jail based on a spurious vagrancy warrant in the name of 'Joe Smith.' Thus, the necessary predicate for the application of the exclusionary rule of *Wong-Sun* is indisputedly present in this case."
>
> • • • • •
>
> ". . ..I would hold that the evidence as to the manner in which Collins was taken into and held in custody was clearly sufficient to establish the prima facie inadmissibility of his post-arrest statements."
>
> • • • • •
>
> "It is clear that the confession obtained on the morning of January 21 was the 'target' of Collins' unlawful detention. Collins was kept in custody, not because the police had a legitimate basis for detaining him for as long as they did, but merely because his detention and questioning were aids in their 'investigation.'

Nor can the mere passage of time serve to 'dissipate the taint' of an unlawful arrest. If this were so, the police would be free simply to keep a suspect 'on ice' for a day or two before beginning an interrogation. This would postpone the tasting of the fruit but would not diminish its temptation." (Emphasis our own.)

* * * * *

"The taint of Collins' unlawful detention could not have been purged by the fact that he might have been warned *after he had completed his oral statement* and while officer Baker was preparing to commit this to writing, that he need make no statement. See *Killough* v. *United States*, 1962, 114 U.S. App. D.C. 305, 315 F.2d 241; 74 Harv. L. Rev. 1222-24 (1961). The reaffirmation of Collins' oral statement cannot be considered independent of that statement. There was neither a sufficient lapse of time, cf. *U.S.* v. *Bayer*, 1947, 331 U.S. 532, 541, 67 S.Ct. 1394, 91 L.Ed. 1654, (six months) nor a significant change in circumstances . . . Nor, I believe, would the taint be purged even if we were to hold the confession was 'voluntary.' See *Wong-Sun* v. *United States, supra*, 371 U.S. at 486, 83 S.Ct. at 417, n. 12."

In a separate concurring opinion in that case, Circuit Judge Friendly preferred to reverse the judgment on the "totality of the circumstances," rather than to resolve Collins' claims in regard to *Wong Sun* v. *United States, supra*. He did say, however (348 F.2d at 834-835):

"I thus follow Chief Judge Tuttle on the general proposition that *Wong Sun* prohibits the introduction in a state criminal trial of a confession that is the result

of an arrest violating the Fourth Amendment, just as *Mapp* prohibits the reception of an object obtained through an unconstitutional search."

Circuit Judge Friendly was reluctant to reverse on the grounds of *Wong Sun*, since the Supreme Court had not yet defined the limits of that doctrine.

In our briefs, we called to the attention of the Court of Criminal Appeals of Texas, Mr. Justice Stewart's opinion in *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223 (R. 451), where this Court said (379 U.S. 91, 85 S.Ct. 225-226):

"Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense. *Brinegar* v. *United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879; *Henry* v. *United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134."

* * * * *

"An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. . . . When the constitutional validity of an arrest is challenged, it is the function of a court to determine

> whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed. *Carroll* v. *United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543" (379 U.S. 96, 85 S.Ct. 228).

The exclusionary rule was applied to confessions which were the product of an unlawful arrest.

The Texas court distinguished the instant case from *Collins* v. *Beto, supra,* on the facts of the two cases. We submit that this distinction is not sound, because this Record shows a far more flagrant abuse of the power to arrest than was the case in *Collins.* The record demonstrated that Collins' two confessions did not follow "a long period of questioning by teams of officers," as the Texas court said (R. 462, 473) in this case. The Texas court also made much in its last two opinions of the fact that petitioner had not been questioned for three days prior to the time he made the third confession which was introduced in evidence. That court, therefore, attempted to draw a distinction by declaring that the "taint of the unlawful arrest" had been dissipated by the time the third confession was made.

We believe that this distinction, in these circumstances, has absolutely no validity. Petitioner was "afraid"; he "didn't think I could go through with the same thing that I had went through for three or four more days, and I had already made two statements, so I didn't figure it made any difference"; he had been threatened with another lie detector test and testified at the trial (R. 127):

"Q. Did you want to take another lie detector test? A. No, sir. I told him I wouldn't take narry another one."

Petitioner testified that the deputies and the district attorney did not mistreat him Tuesday morning before he gave the third confession (R. 151-152), but that he was scared to begin with, on that morning (R. 152). Although he began by denying any guilt at that final interrogation (R. 232, 306) and asked to "talk to someone" (R. 235), he finally gave in after the district attorney questioned him and he saw the pattern of events beginning to again take shape. He could "see it looked like the same thing happening all over again . . . and I didn't think I could take that no more" (R. 153).

The following testimony further reveals petitioner's state of mind at the time of the third confession (R. 307):

"Well, I had already been through that once, and those other officers told me the same thing, that nothing was going to happen to me, they wasn't going to do this and they wasn't going to do that, but they did, so they went and got Mr. Mims . . . so I was scared, because I figured the same thing that those officers done to me, that they would do the same thing; so I had already signed two statements and I didn't figure it made much difference . . ."

In *Ward* v. *Texas*, 316 U.S. 547, 552, 62 S.Ct. 1139, 1142, 86 L.Ed. 1663 (1942), this Court was confronted with a set of circumstances which, in many respects, parallel the facts in this case. This Court said:

"There can be no doubt that from first to last the officers acted without authority of law. The sheriff of Morris county had no authority to arrest petitioner in Titus county. Without the boundaries of Morris county he had no more authority than any private citizen. *Ledbeter* v. *State*, 23 Tex.App. 247, 5 SW 226; *Hooper* v. *Diesher*, Tex.Civ.App., 113 SW2d 966, 967. Nor did Constable Redfearn of Titus county have the right to take petitioner into custody. Under *Article 215* of the *Texas Code of Criminal Procedure*, the sheriff must procure a warrant before making an arrest unless he has been advised by a credible person that a felony has been committed and that the offender is about to escape . . . And *Article 217* provides that the person making the arrest must immediately take the person arrested before the magistrate, if the arrest is made without a warrant. Neither the sheriff of Morris county nor Constable Redfearn made any effort to secure a warrant. Instead of taking petitioner to the nearest magistrate, they took him away from the nearest magistrate. There was no pretense that the arrest had been made because of information that he was about to escape. He had been released Sunday after his first detention and on Tuesday evening he was attending a party at his church, when the sheriff of Morris county arrested him."

We believe that the facts in this Record call for the application of the exclusionary rule of *Wong Sun* and *Beck*. Each of these three confessions was the fruit of the illegal arrest, and the taint of that arrest was not dissipated by any conduct of the officers or by any other circumstances. To the contrary, the officers thereafter compounded the illegal detention by their coercive conduct.

Any confession—written or oral—which petitioner made after Morales placed him under arrest early Sunday morning should have been excluded from the jury, because of the circumstances of petitioner's arrest. The only warrant which was ever issued in this case was issued on the basis of his coerced confession late Monday. This in itself should vitiate any further confessions. The pressures attendant to the first two confessions were still operating when the third confession was signed.

3.

Refusal of the Trial Court to Require the State to Make Available to the Defense All Confessions Signed by Marvin Clewis Constituted a Denial of Due Process.

Petitioner's Motion to Require the State to Produce Confessions (R. 3-5) was overruled by the trial court. Petitioner contended that his counsel's knowledge of the content of these confessions was necessary to an adequate defense, and that the refusal of that Motion constituted a denial of due process. Petitioner was never permitted to see, inspect or use those writings at the trial. It thereby became impossible to demonstrate the inconsistencies in the three written statements by the best evidence available: the statements themselves. In order to get before the jury a picture of the coercive treatment of petitioner by the police and to show the inconsistencies of the written statements; it was necessary to cross-examine all of these witnesses for the state, without having the benefit of those writings. The difficulties of proceeding in that manner and the resulting prejudice to this defendant are readily apparent—yet this was the only procedure left to petitioner.

The purpose of the prosecutor is, of course, apparent. Knowing that there was evidence that the first two confessions were coerced, the state sought to get around this road-block by introducing only the third written confession in evidence. Had the jury been allowed to see all three confessions, the coercive conduct of the police would have been much more demonstrable by petitioner in his defense.

This is much more than a procedural question. In these circumstances, petitioner was denied a right guaranteed to him by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

As this Court said in *Dennis* v. *United States,* —— U.S. ——, 86 S.Ct. 1840, 1849, —— L.Ed.2d —— (1966), in an opinion by Mr. Judge Fortas:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C., Sec. 3500, responding to this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice."

While that case was concerned with federal procedural rules, and specifically with denial by the federal District Court of petitioner's motion to examine the Grand Jury minutes, we believe that denial of petitioner's motion in

this case amounted to a substantial deprivation of his constitutional rights.

It is unnecessary to cite the great number of cases in which this Court has held that matters of procedure are to be left to the states, and that this Court will not disturb that procedure. Yet, why is not the production of these confessions just as vital and just as substantial as arrest procedure, arraignment procedure, and the right of cross-examination? While petitioner at this point has not briefed this question as thoroughly as we would prefer to do—believing that the illegal arrest and the "totality of the circumstances" require reversal and exclusion of any confessions made by petitioner—we cannot escape the haunting conviction that any defendant, whether tried in a state or federal tribunal, is entitled to full "disclosure, rather than suppression, of relevant materials." While the author of this Brief assuredly does not hold himself kindred to the brilliant students and advocates of Constitutional Law in this country, we cannot shake the notion that a defendant convicted after such denial has been deprived of his liberty without due process of law. The right to disclosure should be extended to state trials.

Conclusion

For the reasons stated, petitioner has been denied due process and has been deprived of his rights under the Fourth and Fifth Amendments to the Constitution of the United States. Apart from the confession introduced in evidence as State's Exhibit 13 (R. 428-429), there is no evidence by which petitioner could have been convicted of the murder of Dorothy Mae Clewis. We have demonstrated

that there is nowhere in this Record any evidence that Dorothy Mae Clewis died (if, indeed the bones discovered northwest of Midland once comprised her frame), by means of any criminal agency. Petitioner had been married to her seven years, and was a hard-working man and a good husband, who had never before been in trouble with the law.

Because of the totality of the circumstances and his illegal arrest and detention, the confession introduced in evidence should have been excluded. Petitioner filed a motion to exclude and suppress those confessions, which was overruled by the trial court. The introduction of this statement calls for reversal of the conviction, together with findings which would forever bar the use of any statement made by him—oral or written—in any subsequent trial.

Petitioner respectfully urges upon the Court that the conviction which was affirmed by the Court of Criminal Appeals of Texas should be in all things reversed, and the case remanded for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

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NO. 648 ~~MISC.~~

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

MARVIN CLEWIS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

Petition For Writ of Certiorari To The Court of Criminal Appeals of Texas

BRIEF OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

MARVIN CLEWIS,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

Petition For Writ of Certiorari To The Court of Criminal Appeals of Texas

BRIEF OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the State of Texas, Respondent, in opposition to Petitioner's Application for Writ of Certiorari and states:

OPINION BELOW

The Court of Criminal Appeals of Texas, the highest Court having jurisdiction in criminal cases in this State, affirmed the conviction of Petitioner, Marvin Clewis, in Cause No. 37,483, on the 4th day of October, 1965, and this Opinion appears in the Record at Pages 441-445. That Court delivered another Opinion on "Appellant's Motion For Rehearing," which was delivered on November 10, 1965 (R. 461-462). This Opinion was amended by the Court on January 5, 1966 (R. 472-474).

The reason that these Opinions have been withheld from publication is due to the fact that the mandate of the Court of Criminal Appeals will not issue on any criminal case which is on writ of certiorari to the Supreme Court of the United States.

Petitioner was convicted for murder with malice and the punishment assessed was twenty-five (25) years confinement in the State penitentiary (R. 24-25).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3), and Rule 19(1), Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

WAS THERE A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES UNDER THE FACTS BELOW IN THE ADMISSION INTO EVIDENCE OF THE WRITTEN CONFESSION OF PETITIONER?

II.

IS THE RULE ANNOUNCED IN *MALLORY V. UNITED STATES,* 354 U.S. 449, INTERPRETING RULE 5a OF THE FEDERAL RULES OF CRIMINAL PROCEDURE APPLICABLE TO THE STATES?

III.

WAS THERE A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTH, FIFTH,

SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY THE TRIAL COURT IN DENYING PETITIONER THE RIGHT TO SEE AND INSPECT THE FIRST TWO CONFESSIONS OF PETITIONER WHICH WERE NOT OFFERED IN EVIDENCE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appropriate constitutional and statutory provisions are cited in Petitioner's Brief.

STATEMENT OF THE CASE

On May 11, 1964, Petitioner's trial for the murder of Dorothy Mae Clewis was begun in the District Court of Midland County, Texas. The indictment under which Petitioner was tried alleged that he "did then and there voluntarily and with malice aforethought kill Dorothy Mae Clewis by choking her with a belt and in some way or manner, and by some means, instrument and weapon, to the Grand Jurors unknown." (R. 1). On May 17, 1964, a verdict of guilty was returned by the jury and punishment was assessed at confinement in the State penitentiary for a term of twenty-five (25) years (R. 23). Judgment was entered on the jury's verdict (R. 24), and Marvin Clewis was thereafter sentenced in accordance therewith (R. 37).

The State's evidence shows that on Thursday, July 5, 1962, two Latin American boys found the remains of what they believed to be a human body in a shallow grave Northwest of the City of Midland, Texas (R. 40-41). This discovery was reported to the Sheriff's office, and the Sheriff's deputies went to the scene and

dug from the ground the remains of a human skeleton (R. 41). Deputy Sheriff Guy Fletcher stated that the skeleton had something across the legs that looked like a black brassiere, and a belt around the neck (R. 42). Deputy Sheriff Fletcher testified that a police officer by the name of Morales from the City Police Department assisted in the investigation (R. 43). The remains were picked up by the Ellis Funeral Home and delivered to Dr. Madsen (R. 45-46, 241). Dorothy Mae Clewis was reported missing by her daughter but was never reported missing by Marvin Clewis, Petitioner (R. 47, 248, 311).

Deputy Sheriff E. H. Kirksey's testimony substantially agreed with Deputy Sheriff Fletcher's testimony. He testified that the belt was around the skeleton's neck and the brassiere was around the legs between the knees and the hips of the skeleton (R. 49). Deputy Sheriff Kirksey took the skull that was found and carried it to Dr. Radford in Waco, Texas (R. 50). Dr. Hughston made a mold of the teeth in the skull (R. 51).

On cross-examination, Deputy Sheriff Kirksey testified that he talked to Marvin Clewis on Saturday night in the Sheriff's office (R. 55), at about 11:30 p.m. He had received a call from his office saying that Marvin Clewis was there in the office and to come down and talk to him (R. 56). He questioned Petitioner for about an hour and a half but did not put him in jail (R. 57). Petitioner was released and told to go home and to come back at 8:00 o'clock the next morning (R. 57).

Dr. D. H. Radford, a dentist from Waco, Texas, testified and identified State's Exhibit No. 9, (the mold of the teeth) (R. 60, 62, 242). He testified that in his

opinion it was a mold of the teeth of Mrs. Dorothy Mae Charles (R. 62), and that he had seen her three times in connection with some work he had done on her teeth (R. 63). The doctor testified that the reason he was so certain that it was a mold of Mrs. Dorothy Mae Charles' teeth was because the work he had done on her teeth was a very unusual case. With minute detail he went on to explain why this was such an unusual case (R. 66). The doctor identified State's Exhibit No. 10 as being a picture of Dorothy Mae Charles (R. 62) (one and the same as Dorothy Mae Clewis) (R. 69).

Mrs. James F. Burford identified State's Exhibit No. 10 (photograph of Dorothy Mae Clewis). Mrs. Burford testified that Dorothy Mae Clewis was an employee of hers who did general housekeeping for her and the last time that she saw her alive was on January 19, 1962 (R. 69). Dorothy Mae Clewis was to return for work on the following Monday, January 22, 1962, but did not report for work thereafter (R. 69).

Mrs. Shirley Jean Judi testified that her mother's husband was Marvin Clewis and identified him in the courtroom (R. 72). She testified that her mother and Petitioner lived in Apartment 7. Mrs. Judi and her husband lived in Apartment 9 in the same apartment housing area. She testified that around January of 1962, on a Saturday night, her mother and Petitioner had gone to a dance, and when her mother came home, she had a knot over her eye, was crying, and had one shoe on and one shoe in her hand (R. 74). Her mother told her that Petitioner had hit her (R. 74). Her mother raised her dress up on the side and told her that Petitioner had whipped her that night with a rubber hose and her leg was real blue and red. When Petitioner

was asked why he had hit her, he stated that she was his wife and he would hit her anytime he wanted. One night Mrs. Judi heard some tussling in the backyard and found Petitioner with his hand around her mother's neck. (R. 74). She testified that Petitioner had threatened her mother on other occasions (R. 75-76). Some time later, Mrs. Judi had occasion to be riding with Petitioner in his panel truck (R. 77). They were riding down a gravel road and made a sudden stop causing a pair of black shoes with three buttons on it to slide out from under the seat of the truck. She testified that her mother was wearing those same black shoes with the three buttons on them the last time that she had seen her alive (R. 78).

Mrs. Judi identified the black brassiere (offered as State's Exhibit No. 2), as being the one her mother wore the Saturday night that she had visited her at her home (R. 79). She identified State's Exhibit No. 3 as the belt that was used by her mother when whipping the children (R. 79, 85). Mrs. Judi, again on cross-examination, testified that Petitioner had threatened to kill her mother (R. 86).

THE FOLLOWING EVIDENCE WAS ADDUCED AT THE HEARING ON DEFENDANT'S MOTION TO EXCLUDE AND SUPPRESS THE CONFESSION.

Deputy Gene Howell of Midland County testified that on July 17, 1962, he took Petitioner's voluntary statement (R. 92, 229). He warned the Petitioner that he did not have to make any statement at all, and any statement that he would make could be used in evidence against him on his trial for the offense concerning which the statement was made (R. 93, 230). He tes-

tified that the statement had been freely and voluntarily made without any undue persuasion or any promises of reward or force (R. 93, 230). Deputy Howell talked to Petitioner for the first time on Tuesday, July 17, and that was the first time that he had talked to him about anything in connection with the case (R. 94). On Redirect Examination, Deputy Howell testified that he did not know of his own personal knowledge whether or not Petitioner had been abused. He stated that he himself did not abuse him in any way and advised the Petitioner that he (Howell) was not going to do anything to him one way or the other no matter what he did (R. 97). He told Petitioner that regardless of anything that he might say or might do or might not say or might not do, that he had nothing to fear, that no harm would come to him in any way, and that he would not be abused or even talked to any longer, if he desired not to be (R. 97, 235). There were no Texas Rangers, City police officers or polygraph operators present (R. 235). Prior to giving that statement, Petitioner was asked the possibility of giving another polygraph test, to which he readily agreed (R. 98). Before taking Petitioner's statement, the Petitioner mentioned that he would like to talk to someone. The Deputy Sheriff asked him who he would like to talk to, and Petitioner said, "Well, he didn't know for sure." The Deputy Sheriff asked him if he would like to talk to a lawyer, and Petitioner replied, "I would like to talk to my boss man." (R. 98). The Deputy Sheriff then attempted to place a call to his boss in Odessa (R. 98, 235).

> "A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.

"Q. All right, what happened?

"A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time." (R. 235)

Petitioner had some coffee that morning in the Sheriff's office (R. 236).

MARVIN CLEWIS, THE PETITIONER, TESTIFIED IN SUPPORT OF HIS MOTION TO EXCLUDE AND SUPPRESS THE CONFESSION.

Petitioner testified that his name was Marvin Clewis, that he was thirty-seven (37) years of age, and that he was in Borger, Texas, when he first heard that a body had been found Northwest of Midland. On the 4th day of July, he received a phone call from Elizabeth Johnson, and Saturday night left for Midland, Texas (R. 100). That Saturday evening before he left he received a telephone call from his sister, Annie May Owens, advising him that the Sheriff wanted to talk to him about Dorothy in Midland, Texas. (R. 101, 264). When he got to Midland, Texas, he went directly to the courthouse to see the Sheriff (R. 101). He arrived at the Sheriff's office around 11:30 or 12:00 o'clock at night. Deputy Sheriff Kirksey was called in and came down to question him. He was not placed in jail that night, but was told to go home and be back there at 8:00 o'clock or 9:00 o'clock Sunday morning (R. 266). On Sunday morning, at around 6:30, Sergeant Morales of the Police Department came by where Petitioner

was staying and asked Petitioner to go with him to the police staion (R. 103-104, 267). Officer Morales talked to Petitioner at least an hour and a half or two hours. Then another officer talked to Petitioner for about an hour (R. 105). He was then carried to a cell and locked up. After about an hour of being in the cell, the officers then got him again (R. 105), this time questioning him for about two and a half hours (R. 106). He testified that he was taken back and forth to his cell and was questioned throughout the day (R. 106). He stated that he was not offered anything at lunch or anything to eat during that day. He also testified that he did not ask for anything to eat (R. 106). He testified that he was questioned until after midnight and maybe around 2:00 o'clock in the morning (R. 107).

Petitioner testified that Monday morning Sergeant Morales came to get Petitioner at approximately 7:30 or 8:00 o'clock. Morales then questioned him for about fifteen or twenty minutes and then took Petitioner to the spot where the body had been found (R. 109). He was then taken to the Public Safety Building in Midland, Texas (R. 110), where he remained the rest of the day. Late in the evening, he drank some milk (R. 111), after having signed a statement. He did not have anything to eat at noon. After a two or three hour interval, Petitioner was given two polygraph tests (R. 111). Petitioner testified that while he was out there he was threatened by Ranger Wood, Sergeant Morales, and the fellow who was giving the polygraph test (R. 112). However, he testified that Ranger Wood did not hit him at that time (R. 112), but that Sergeant Morales slapped him up beside the head (R. 114). Later he was taken to the courthouse (R. 116). In the basement of the courthouse, Petitioner was taken before a

justice of the peace, but stated he did not remember whether his rights to waive an examining trial were explained (R. 116, 384). He was asked if he wanted a bond set (R. 116, 289).

After he left the courthouse, he was taken to the City Jail (R. 117). That Monday night he made a telephone call to Elizabeth Johnson, but he could not reach her (R. 117). After a couple of hours he was taken out of his cell and was questioned for about an hour and forty-five minutes by several officers who took turns in questioning him (R. 119). After midnight, he was then led back to his cell. He testified that he was not abused or threatened in any way by the officers that night (R. 119).

Petitioner stated that early Tuesday morning Sergeant Morales came and got him out of his cell and took him back to the office and questioned him (R. 120). On Tuesday morning, he received something to eat (R. 120, 295). He testified that he was questioned throughout the day on Tuesday and Tuesday night (R. 120). Petitioner stated that he was not questioned on Wednesday at all (R. 120-121). On Thursday morning Sergeant Morales came up to his cell and took him in Ranger Wood's car to Borger. He was not handcuffed in the automobile (R. 121). In Borger they were looking for his truck. Petitioner took them to where he worked to show them the truck (R. 122). He testified that he did not give them consent or permission to go into or search the truck (R. 122). Petitioner testified that one of the police officers at Borger bought him some milk at noon (R. 122, 300). From Borger they drove to the Public Safety Building in Midland, Texas. While at the Public Safety Building, Petitioner says

he was given a polygraph test. He testified that he had not signed any consent or agreement to take that particular test. He testified that he had given consent on Sunday (R. 123).

Petitioner testified that no one abused him during the time he stayed in the County Jail (R. 127).

On cross-examination, Petitioner testified that the Saturday night that he returned to Midland he went to the Sheriff's office and that nobody threatened or abused him in the Sheriff's office that night (R. 128). He further testified that he was not afraid at the Sheriff's office that night and was not scared. He was not asked to give a confession that night and no one tried to get him to confess (R. 128). He testified that he slept on Saturday night until around 6:30 in the morning when Officer Morales came by his house and introduced himself as an officer. While Petitioner testified that he did not know whether he was a police officer or a deputy sheriff, he did testify that he knew that he (Sergeant Morales) was a peace officer (R. 129). He testified that he was not threatened by Sergeant Morales when he arrived at the police station (R. 129), and he was not abused by anyone (R. 129). After having been questioned for about an hour or two by Sergeant Morales and another officer, Petitioner was taken to his cell where he remained for an hour without being molested. He admits that there was water in his cell and restroom facilities (R. 131). Officer Morales and another officer then got Petitioner out of his cell and took him downstairs to an office where he was questioned for an hour or two (R. 131). Petitioner testified that he was not threatened or abused in any way in that time (R. 131).

Petitioner's mother-in-law and sister visited Petitioner on Sunday. Elizabeth Johnson also visited with him (R. 132, 271, 312, 368). On Sunday night, Petitioner was questioned by Sergeant Morales and the fellow "who smokes a pipe." (R. 132). He was questioned anywhere from an hour to an hour and a half or two by each one of them on Sunday night. He stated it was past midnight when he was carried back to his cell. Petitioner testified that he was not threatened in any way during this period of time (R. 133). Petitioner stated he was allowed to rest and was left alone in his cell from approximately 2:00 o'clock a.m. on Monday until 7:30 or 8:30 that morning (R. 133). He was not abused by anyone when he was driven to the grave on Monday morning by Sergeant Morales and two other officers (R. 133-134). He was not threatened or anything of that nature by any of the officers (R. 134). He was out there at the grave anywhere from twenty to thirty minutes and there were no threats out there or abuses of any kind. On Sunday, Petitioner signed permission to take the polygraph test (R. 134). He testified that he was not threatened in any way to sign the waiver to take the polygraph examination (R. 135). He admitted that he was not scared about signing the permission to take the exam (R. 135). On Monday morning, he was questioned at the Public Safety Building by Sergeant Morales, Ranger Wood and Reed (R. 135).

Petitioner testified that he was not abused in any way when he was taken to the justice of the peace office in the courthouse (R. 139). Petitioner testified that he called Elizabeth Johnson on Monday night but could not reach her because she was not at home (R. 140, 312). Petitioner testified that he was not abused by

Morales or the "big man with the pipe" or the "dark-headed man" on Monday night. He was not threatened, abused and no one struck him with anything that night (R. 141). Nobody bothered him on Monday night after he was placed in his cell (R. 142).

On Tuesday morning, Sergeant Morales and a uniformed police officer took him down to the office. He was not threatened or abused in any way (R. 142). That morning Sergeant Morales did not threaten, strike him or abuse him in any way (R. 143). On Tuesday Petitioner had a roll, potato and a slice of bologna in the morning (R. 143, 295). Petitioner testified there was no abuse of any kind on Tuesday (R. 144). All day Tuesday Petitioner was not threatened and was not abused in any way (R. 145). Wednesday, he said he was not questioned at all by anyone. He was left alone in his cell (R. 145). He was fed during those days (R. 146). He had a bed to sleep in and could have gotten a good night's sleep on Wednesday night, however, he testified that he did not get a good night's rest (R. 146).

Petitioner testified as follows at Page 145 of the Record:

"Q. All right, and then you were put in your cell and left alone. Is that correct?

"A. Yes sir.

"Q. Let's see if I have got this straight now. All day Tuesday you never were threatened and were never abused in any way.

"A. No, sir.

"Q. What about Wednesday?

"A. Wednesday I don't think they questioned me at all. If they did I don't remember it.

"Q. All right, no questioning on Wednesday.

"A. No, sir.

"Q. You were just left alone by yourself. Is that right?

"A. Well, yes, sir, as near as I can remember.

"Q. All right. You had food? They fed you?

"A. I guess they brought me something.

"Q. They treated you well in every way. Is that right?

"A. Yes, sir, I suppose so.

"Q. O. K. You got a good night's rest on Wednesday night.

"A. There wasn't nobody bothered me; I wouldn't say I got a good night's rest.

"Q. Your had a bed to sleep on and all that.

"A. Yes, sir.

"Q. I guess that brings us to Thursday then. What happened Thursday?

"A. Well, Sgt. Morales came up there and got me Thursday.

"Q. Excuse me, go ahead.

"A. He came up there and got me Thursday.

"Q. Is this the day you went to Borger?

"A. Yes, sir.

"Q. All right, and it was Morales and Mr. Wood. Was there anybody else with you that went to Borger?

"A. Well, it was Sgt. Woods, Mr. Morales, and some other fellow.

"Q. Did they threaten or abuse you on the way to Borger?

"A. No, sir."

In Borger, Texas, Petitioner had some milk (R. 147). After Petitioner got back to Midland on Thursday night, he was not threatened or abused in any manner and was left alone in his cell (R. 148). He was not questioned on Friday (R. 149). On Friday he was just taken over from the City Jail to the County Jail, but he was not abused, threatened or anything else (R. 149). After he was placed in the County Jail, he never saw the Texas Ranger again (R. 149), and he did not see Sergeant Morales again (R. 149). He never saw the polygraph operator after Thursday (R. 150). On Friday, while in the County Jail, no officer or any official, deputy sheriff or otherwise, questioned or talked to Petitioner that day. On Saturday no one asked Petitioner any questions or abused him or threatened him in any way (R. 150). On Monday, no one talked to Petitioner, nobody abused him or threatened him in any way. Deputy Sheriff Howell talked to Petitioner for the first time on Tuesday morning (R. 150). The only thing that happened during that period of time was that Petitioner was taken from his cell and was fingerprinted (R. 151). Petitioner testified that Mr. Howell did not abuse him in any way on Tuesday morning. He was not abused or threatened by anyone (R. 151, 306, 307). Petitioner testified that he was treated real nice in every way by Mr. Fletcher and Mr. Howell (R. 151). Mr. Mims also treated Petitioner very nice (R. 152). Petitioner testified that he was fed all right when he was in the County Jail. He got all the rest he needed.

On re-cross examination, Petitioner testified that on Tuesday morning when he was questioned by Mr.

Fletcher and Mr. Howell, he was not hungry (R. 153). On Pages 154 and 155 of the Record, Petitioner testified that he did talk to a lawyer, H. S. Harris, but that he did not remember the date or whether or not it was made before the second confession was given. Petitioner testified that he talked alone with the lawyer (R. 155, 314):

> "Q. . . . Did you talk alone with the lawyer, just you and him alone?
>
> "A. Yes, sir." (R. 155).

Officer Jesus Morales testified that on Sunday morning, July 8, 1962, he went to Petitioner's house, identified himself as a peace officer and advised him that he wanted to talk to him and that he wanted to talk to him at the police station, and asked him if he would come along with him (R. 158). Officer Morales testified that on Sunday morning Petitioner had some coffee and a roll (R. 368, 377). He talked to him about an hour and a half and then placed him in jail (R. 158, 367). Morales testified that he was not sure, but that he thought he had brought him some cigars that morning around 11:00 o'clock and might have talked to him 15 or 20 minutes (R. 158, 377). He did not threaten or abuse or strike Petitioner on Sunday, and he never drew back as if he were going to hit him (R. 159, 368). On Sunday, Petitioner had three visitors: his sister, Annie May Owens; Elizabeth Johnson, and Rachel Garnett (R. 159, 312). They had an opportunity to talk to Petitioner alone on Sunday afternoon (R. 159, 368). Petitioner did not eat on Sunday evening because he stated that he was not hungry (R. 160). Elizabeth Johnson brought Petitioner some soup that evening as Petitioner would not eat, either because he was not

hungry or he did not want the food (R. 160). Late on Sunday afternoon, a plate of food was brought to Petitioner but he did not eat it (R. 160, 379). Officer Morales testified that he left Sunday afternoon around 5:30 and did not talk to him any more on that day (R. 160). Officer Morales did not talk to Petitioner at any time on Sunday night or after midnight (R. 368). On Monday morning Officer Morales, at around 7:00 o'clock in the morning, went to see Petitioner. Petitioner was in his cell, and there were some rolls of bread in his cellblock laying between the bars of his cell (R. 161). Officer Morales denied having threatened, abused or coerced Petitioner in any way on the way up to where the body was found or while at the grave (R. 162). From there they went back to the police station where Petitioner changed his clothes (R. 163). They were at the police station about thirty minutes while Petitioner changed his clothes and then departed for the Department of Public Safety (R. 163). Officer Morales testified that he did not see anybody abuse Petitioner in any way while he was at the Department of Public Safety (R. 164). Morales denied having interrogated him for any long period of time. He admits having questioned him for brief periods of time. On Monday, at the Department of Public Safety, Officer Morales asked Petitioner if he wanted some food, and he said no, and then Officer Morales asked him if he wanted some soup, and Petitioner replied no. Again Morales asked him if he wanted some milk, and Petitioner said no, and finally the Officer asked him if he wanted a Coke, to which Petitioner replied, "Yeah, I'll take a Coke." Officer Morales then got a Coca-Cola for Petitioner (R. 165, 369). Petitioner did not request to see a lawyer (R. 370). After that there

were short periods of interrogation, anywhere from 15 to 20 minutes. On Monday afternoon, Sergeant Morales denied having struck the Petitioner at any time and denied having called him a "black s.o.b." Morales denied having heard anyone state that they would get Petitioner some milk if he confessed (R. 166). On the way to the police station, Morales stopped at a grocery store and bought Petitioner some soup and crackers (R. 370, 384).

Petitioner was visited by Elizabeth Johnson on Monday night around 9:00 o'clock (R. 370).

Officer Morales denied having talked to Petitioner at any time on Tuesday, July 10 (R. 371, 386). He denied having been anywhere around Petitioner on Tuesday night. Officer Morales did not go to Borger on Thursday, July 12, with the Petitioner. However, on Thursday morning before Petitioner left for Borger he talked to a lawyer. The Record states on Page 374:

"Q. All right, sir, I call your attention to Thursday morning. You know Mr. H. S. Harris?

"A. Yes, sir.

"Q. Would you tell the jury, please, whether or not this defendant had a visitor Thursday morning.

"A. He did.

"Q. Was it Mr. Harris?

"A. Well, I went upstairs at the police department and noticed Mr. Harris talking to Mr. Clewis over here in one of the cells, and I went over to where Mr. Harris was and asked him if he wanted to use one of our offices, which is also located upstairs. He said he would be glad to, so I directed him back into

the office, our detective office—we have three rooms back there—and he went into the furtherest office in there, and I asked him if he wanted any coffee and he said he did. I asked Marvin if he wanted something, so I brought two cups of coffee in there, and Mr. Clewis over here said he didn't want any coffee and I asked him if he wanted some milk and he said yes, so I went back—we had some milk for him in the ice box there in the kitchen—and I brought a cup and a quart of milk to him, and when I left Mr. Harris was talking to him.

"Q. Is Mr. Harris an attorney here in town?

"A. Yes, sir, he is.

"Q. This was Thursday morning?

"A. Yes, sir.

"Q. July 12, 1962.

"A. That is correct."

Morales was positive that Petitioner saw a lawyer on Thursday morning (R. 388). He denies having cursed or used profane language toward the Petitioner (R. 166). He denied having abused, coerced or threatened Petitioner on that Thursday in Borger, Texas (R. 167). Petitioner was offered food during the time that he was in Borger, Texas (R. 168), but instead of taking food, he drank milk (R. 168). In Borger, Petitioner's truck was searched after he had given permission to search the truck (R. 168, 371, 416). In Borger he visited with his brother-in-law who was there (R. 168). The Record reflects at Page 372:

"Q. Was he allowed to have visitors while he was up there in Borger?

"A. Yes, sir. When we were searching the panel truck, he had some—I think it was his brother-in-law, he said it was his brother-in-law—he talked to him and they brought him some water there. He sat down on the running board of the panel, or right next to the panel, which I found out later that one of them was his brother-in-law. I think his name was Owens.

"Q. He visited there with his brother-in-law.

"A. That is correct.

"Q. Brought him some water.

"A. Yes."

Officer Morales denied having heard John Wood curse or abuse the Petitioner in Borger (R. 168). On cross-examination, Officer Morales stated that he had asked Clewis if he wanted to come to the police station on Sunday morning (R. 170). When asked what would happen if he had not come, Officer Morales responded with, "He would have stayed there." (R. 170). Officer Morales did not talk with Petitioner on Sunday night (R. 176). Mrs. Johnson brought Petitioner some soup on Sunday about 5:30 p.m. (R. 176). He was offered food on Sunday, but was not hungry and did not eat (R. 177). Petitioner had some rolls and coffee on Sunday morning (R. 177). He saw Petitioner drink some coffee and eat the rolls (R. 177). On Monday morning he was given some rolls, but he did not want them (R. 178). Petitioner did not want any lunch on Monday noon (R. 178). He did have a Coke, and later on in the evening he had some milk. A quart of milk was purchased for him (R. 178, 210). Sergeant Kuykendall went after the quart of milk, and the milk was given

to Petitioner before he gave the statement (R. 178, 399). Petitioner gave his statement on Monday afternoon in the District Attorney's office. Later on that night, he was taken before a magistrate (R. 180). The Sergeant testified that he never touched the Petitioner, never slapped him or anything (R. 182). He was given an opportunity to eat but he never did want to eat anything (R. 182-183).

John Wood, the Texas Ranger, testified that he saw Petitioner Clewis for the first time on Monday, July 9, 1962. He denied having questioned Petitioner under prolonged questioning and denied having exerted any force or threats against Petitioner at any time. He particularly denied having told Petitioner that if he did not confess he "would turn his black ass wrong side out" (R. 184, 408). The Texas Ranger testified that on Monday, July 9, he talked to Petitioner for about fifteen minues (R. 184, 407). The Ranger denied having seen Petitioner on Tuesday, July 10 (R. 185, 409). On Thursday, July 12, the Texas Ranger talked to Petitioner twice. The first time for about five minutes and the second time ten or fifteen minutes (R. 185). He denied having slapped Petitioner or threatened him on that day (R. 185, 408). On July 11, Wednesday, the Ranger took the Petitioner to Borger. He denied having threatened Petitioner on the way to Borger; and denied having abused or mistreated him in Borger on Wednesday, July 11 (R. 186). He denied ever having abused him physically or orally. The Ranger testified that on Thursday, July 12, he talked to Petitioner about 3:00 p.m. He testified that he saw him earlier in the morning around 11:45 with a cigar in his hand and a container of milk (R. 189, 414). He stated that he saw Petitioner drinking milk on Mon-

day (R. 192, 414), and that Petitioner was not refused any food or rest.

Officer Jesus Morales when recalled to the stand testified that the Petitioner had a visitor on Monday night, July 9, 1962. Elizabeth Johnson paid him a visit in the City Jail (R. 193). He visited with her alone that night around 9:00 o'clock. They visited downstairs in the jail and upstairs (R. 193, 370).

Burl Reed testified that he was the polygraph examiner for the Department of Public Safety and that he saw Petitioner on Monday, July 9, 1962, but did not question him over any long period of time (R. 194). On Monday he questioned Petitioner for a short period of time involving a matter of minutes and had rest periods in between. He denied ever having told Petitioner that if he signed a confession he would get him some milk (R. 195, 337). He denied having exerted any force or threats or coercion against Petitioner and denied ever having slapped him. He denied ever having called him a "black s.o.b." (R. 338).

Reed did not see Petitioner on Tuesday (R. 337) or Wednesday (R. 195-196). On Thursday, July 12, 1962, he admits having questioned Petitioner for approximately ten minutes. He was given three tests that day and denied having used any force on Petitioner to get him to take the tests. He denied having abused him orally or physically (R. 196, 338). The longest time he admits having talked to Petitioner outside of giving the exam was approximately for thirty minutes (R. 201, 339). On Thursday afternoon, the longest period of time in which he talked to him was maybe ten or fifteen minutes (R. 202, 338).

Herman Wicker, a member of the City of Midland

Police Department, testified that he saw Petitioner on Sunday, July 8, 1962. He was the "big man with the pipe" (R. 203, 359). He worked the 3:00 p.m. to 11:00 p.m. shift (R. 358). On Monday night around 7:30 or 8:00, he saw Petitioner but denied having questioned him or having threatened or coerced him (R. 359). He denied having tried to get a confession out of Petitioner (R. 203). He saw the Petitioner take some food on Monday night in the City Jail (R. 204, 359). He specifically denied having questioned Petitioner at midnight or thereafter (R. 359). He did not see Petitioner on Tuesday, July 10, at all. The Record, at Pages 359 and 360, state:

"Q. Would I be accurate, sir, in assuming you are what is termed a big man who smoked a pipe?

"A. Yes, sir, I smoked a pipe.

"Q. Now, sir, I ask you about Monday, July 9th, and ask you, sir, if you had occasion to see the defendant.

"A. Yes, I did.

"Q. All right, sir, where was that?

"A. That same place, upstairs in the detective office.

"Q. All right, sir, about what time was this that you saw him?

"A. Between 7:30 and 8:00 o'clock.

"Q. Were you interrogating him at that time?

"A. No, sir.

"Q. Were you trying to get a confession out of him?

"A. No, sir.

"Q. Were you trying to force a confession out of him?

"A. No, sir.

"Q. Did you abuse him in any way?

"A. No, sir.

"Q. Do you recall whether or not he had any food at that time?

"A. Yes, sir, he did.

"Q. Tell the jury, please, what you recall about the food.

"A. Well, the trusty brought in some warm soup, and he had a quart of sweet milk on the desk in front of him. He was sitting in the back office in the northeast corner of the building, sitting at a desk, and he ate some soup and drank some milk.

"Q. Do you recall saying anything to him about 'Do you want a doctor?' or anything of that nature?

"A. Yes, sir, I was sitting in the front office and he was sitting in the back, and I was sitting where I could see him through the door, and I noticed he began to act like he was wanting to vomit or acted kind of like he was sick and I asked him was he all right, and he said well, he thought the milk had soured on his stomach, and I asked him did he want to go to the rest-room or anything and he said yes, he would, so I let him use the rest-room in one of the cells right across the hall from the detective office, and I asked him how he was doing when he finished up there and he said he was doing all right and that he would be all right as soon as his stomach settled. I asked him, 'Do you want a doctor?' and he said 'no.'

"Q. All right, sir. Were you with him any more on Monday besides that approximate half hour you mentioned?

"A. No, sir.

"Q. Did you interrogate him later that night?

"A. No, sir, I did not.

"Q. Did you interrogate him on past midnight?

"A. No, sir.

"Q. Did you try to force a confession out of him past midnight?

"A. No, sir.

"Q. Did you threaten or abuse this defendant in any way?

"A. No, sir."

On Thursday night between 9:30 and 10:00 o'clock, he talked to Petitioner for twenty or thirty minutes but stated that he did not try to coerce or persuade him to make a confession. He did not refuse him any food or rest during any of that period of time (R. 204). He did not question Petitioner at all on Sunday night.

Detective Wayne Gideon of the Midland Police Department, (referred to by Petitioner as a tall officer with a lump or knot on the side of his head [R. 401]), testified that he did not see Petitioner at all on Sunday, July 8, 1962, and did not force Petitioner to sign a waiver to take a polygraph test on that Sunday, July 8 (R. 207). He denied having gone out to the grave in the automobile with Petitioner on Monday morning, but testified that he saw Petitioner around 8:30 in the morning of the 9th of July when Sergeant Morales

brought him into his office. He denied having questioned Petitioner for prolonged periods of time and denied having threatened, coerced or abused Petitioner at any time (R. 402). He denied having questioned him in Midland. He admitted having questioned Petitioner about two or three minutes on Monday, but did not threaten or abuse him during those three minutes. He denied having tried to force a confession out of Petitioner and did not see Petitioner at all on Tuesday, July 10.

Gideon testified that he had seen Petitioner shortly before noon on the morning of Monday, July 9, when Petitioner was in the polygraph room where he was drinking a Coke or soft drink and smoking a cigar. He then asked Petitioner how he was doing, and Petitioner replied, "I'm doing fine." (R. 210, 402). On Monday, on the way to the station from the polygraph examination, Petitioner remarked to Gideon that he would like to have some soup, that he had an ulcerated stomach. They stopped at a little grocery store on North Big Spring Street and Sergeant Morales went inside the store and bought him some soup and crackers, and then returned to the police station and made arrangements with the lieutenant in charge of that particular shift to feed Petitioner the soup (R. 212). Gideon testified that that morning Petitioner had breakfast rolls and coffee and, although he admits not having been there, he testified that Petitioner had told him. (R. 213). In the early part of the afternoon, Petitioner asked one of the officers if he could have some milk and Sergeant Victor Kuykendall left and got him some milk (R. 213).

Ray Robbins, a member of the Midland Police Department, testified that for about an hour he questioned

Petitioner on Monday night between 10:00 and 11:00 o'clock. He denied having questioned him past midnight (R. 214, 349). He admits seeing Petitioner on Sunday, July 8, but denied having interrogated him at all on that day (R. 215, 348). He denied having seen Petitioner any time on Tuesday (R. 215). He testified that the only time he talked to Petitioner was on Monday night for about an hour and did not question him at any other time. To his knowledge, no one questioned Petitioner on Sunday night (R. 216). He further testified that he was off on Tuesday and Wednesday as these were his regular days off (R. 217). He admitted having been at the Department of Public Safety for about fifteen or twenty minutes on Thursday when Petitioner was being brought back to the police station (R. 217).

Lewis B. Salinas, a member of the Midland Police Department, testified that he was the desk sergeant at the police station (R. 219). His duties as such were to have custody of the keys to the jail. He testified that Petitioner was not taken out of his cell or put into his cell anytime after midnight on Sunday, July 8, 1962. Petitioner was neither taken out of his cell or taken to his cell after midnight on Monday, July 9, 1962 (R. 357).

L. O. Wright testified that he was sergeant of the Midland Police Department and was on duty as desk sergeant on Tuesday, July 10, 1962, from 11:00 p.m. to 7:00 a.m. the next morning (R. 220). He had the keys to the jail (R. 353). He testified that Petitioner was not taken out of his cell after midnight Tuesday night (R. 220), or early morning hours of Wednesday (R. 353).

Garland Black, an employee of the Midland Police Department, testified that he worked from 7:00 o'clock in the morning until 3:00 o'clock in the afternoon and that he was on duty Monday, July 9, and Tuesday, July 10, and that on Tuesday, July 10, he fed Petitioner in his cell (R. 221).

Lonnie R. Richardson testified that he was a member of the Midland Police Department in July, 1962, and that he had the 3:00 p.m. to 11:00 p.m. shift as desk sergeant (R. 354). He stated that on Thursday, July 12, 1962, he fed Petitioner at approximately 7:00 o'clock in the afternoon in his cell (R. 222). At that time he fed Petitioner some tomato soup (R. 355). On Wednesday, July 11, 1962, he fed Petitioner milk and crackers (R. 223, 355).

Cope Routh, a reporter for the Midland Reporter-Telegram, testified that he saw Petitioner on July 10, 1962, in the Detective's office. He saw Petitioner around 7:00 o'clock in the morning and testified that Petitioner was a very unhappy appearing individual. He did not recall, however, whether Petitioner had bloodshot eyes as had been reported in the newspaper. He denied that Petitioner had told him that he had been kept up all night one night by the police (R. 225). He testified that he felt certain one of the police officers had told him that Petitioner had stated, "Just bring me some milk and I will give you a statement and sign it." But, he did not remember which officer it was (R. 225).

Victor Kuykendall testified that he was a detective from the Midland Police Department; that he did not see Petitioner on Sunday, July 8, 1962; that on July 9, 1962, Monday, he did see Petitioner but did not in-

terrogate him at any time during that day. He did not see anyone curse, threaten, strike or abuse Petitioner (R. 398). On Tuesday, July 10, 1962, he did talk to Petitioner for a period between fifteen and twenty minutes but testified that he did not abuse or threaten him in any way or coerce him or mistreat him in any manner (R. 226, 397). He did not see him on Wednesday. On Thursday, he saw Petitioner for a few minutes driving to the Department of Public Safety, but did not interrogate him any on that day (R. 227). He did not interrogate him or try to get a confession from Petitioner and did not threaten him or abuse him in any way. (R. 227).

Rachel Garnett, the mother of the deceased, Dorothy Mae Clewis, testified that one Sunday afternoon about 1:00 o'clock, she received a telephone call from her granddaughter asking her to come at once to her daughter's house. When she arrived at the house she heard Marvin Clewis, Petitioner, state, "Dorothy, I am going to kill you." (R. 328). When Mrs. Garnett opened the door to the apartment, the deceased stated, "Mama, Marvin says he is going to kill me." At that time Petitioner was holding a gun and aiming it at deceased's face (R. 329).

Garland Black testified that on one day he served Petitioner milk at least three times (R. 346). He testified that he witnessed Petitioner sign a consent for the officers to search the panel truck in Borger, Texas. (R. 346). The consent was signed on the morning of July 11.

The consent, dated July 11, 1962, signed by Petitioner, bearing signatures of two witnesses and giving officers permission to search his panel truck in

Borger, Texas, was offered as State's Exhibit No. 14 without any objection from the Petitioner (R. 347).

Ray Robbins, Detective of the Midland Police Department, testified that he observed Petitioner making a telephone call from the police station on Thursday, July 12, 1962. The call was made in late afternoon or early evening between 6:00 and 7:00 or 7:30. Mr. Robbins testified that he overheard Petitioner state that he was being treated all right and that he was being supplied with food that he wanted, cigars, etc. (R. 350). Detective Robbins testified that Petitioner addressed the person on the telephone as "Mama Teen," and they knew her to be Elizabeth Johnson (R. 351). The only time that he talked to Petitioner was on Monday night (R. 352).

Wayne Merritt testified that on Wednesday, July 11, 1962, he accompanied John Wood and Jesus Morales and the Petitioner to Borger. They had gone to Borger to look at a panel truck. While the officers inspected the truck, friends of Petitioner's visited with him (R. 363).

Officer Morales testified that while in Borger when they were searching the panel truck, Petitioner's brother-in-law, a fellow by the name of Owens, talked to Petitioner and brought him some water (R. 372).

Wayne Taylor, Assistant Chief of the Midland Police Department, testified that on Thursday, July 12, 1962, he had occasion to bring Petitioner from the Department of Public Safety back to the City Police Station. At that time Taylor asked him if he had been mistreated in any way and Petitioner said that he had not but had been treated real well ever since he had been handled by the officers (R. 396).

ARGUMENT AND AUTHORITIES

I.

A written statement made by Petitioner to Deputy Sheriff Gene Howell, of Midland County, on July 17, 1962, after being duly warned, was introduced in evidence as State's Exhibit No. 15. In the statement, Petitioner admitted that he choked his wife to death with a belt during the latter part of January, 1962, while the two were tussling and fighting in Petitioner's truck parked on a dirt road just outside Midland, Texas. He admitted having placed her body in a hole which he dug with a shovel and covering it with sand. Petitioner related that when he buried his wife, the belt which he choked her to death with was still around her neck.

Testimony was offered that on a Saturday night in January, 1962, Petitioner had threatened to kill the deceased and had choked her.

During the trial, Petitioner denied having killed his wife and repudiated the written statement that was introduced by the State.

Petitioner's "Motion To Exclude and Suppress State's Confession," was heard by the trial court in the absence of a jury. After the Motion had been by the Court overruled, evidence was presented before the jury on the question of the voluntary nature of the confession and such issue was submitted to the jury in the court's charge, under appropriate instructions.

Briefly, the evidence presented on the question of the admissibility of the confession shows that, after receiving word that his wife's body had been found and that the sheriff wanted to talk to him, Petitioner

came from Borger to Midland, on Saturday night, July 7, 1962. He arrived at the Sheriff's office around 11:30 p.m. After talking to Deputy Sheriff Kirksey for about an hour and a half, Petitioner was permitted to go, with instructions to return the next morning at 8:00 a.m. He then left the Sheriff's office and went to the home of Elizabeth Johnson.

At 6:00 a.m. on Sunday, July 8, 1962, Sergeant Jesus Morales of the City of Midland Police Department, went to the Johnson home and took Petitioner to the police station for questioning about his wife's disappearance. Petitioner was questioned at intervals during the day and also on that day was visited by his sister, Annie May Owen, his mother-in-law, Rachel Garnett, and Elizabeth Johnson. Officer Jesus Morales testified that Petitioner had some coffee and rolls that morning and was offered food throughout the day, but Petitioner denied it. There was a dispute in the testimony as to whether Petitioner was questioned after midnight, Petitioner swearing that he was and the officer stating that he was not.

On Monday, July 9, Petitioner was taken from the City Jail around 7:30 a.m. by Sergeant Morales and Sergeant Kuykendall. The three proceeded to the place where his wife's body had been found. When Petitioner led the officers to the hole in the ground, he stated, "I guess that is where she was buried."

From the scene, Petitioner was then taken to the Department of Public Safety, where he was given a polygraph examination by Officer Burl Reed. During the afternoon, Petitioner was questioned and late that evening he made and signed a written statement to Sergeant Morales in which he admitted killing his wife by

shooting her with a gun. After signing the statement, Petitioner was taken before a magistrate, where bond was set, and Petitioner was then returned to the City Jail. Again, there was a dispute in the testimony as to whether or not Petitioner ate and drank a Coke at the Department of Public Safety, and back at the City Jail. Testimony was offered that Petitioner was offered food and soup and finally settled for a Coke at the Department of Public Safety, and a quart of milk at the City Jail. Several officers testified having seen Petitioner drinking the Coke and smoking a cigar around noon at the Department of Public Safety. Petitioner denied most, if not all, of this testimony. There was also a dispute in the testimony as to whether Elizabeth Johnson had visited Petitioner on Monday night at the City Jail in private (R. 193); Petitioner swearing that he was not visited that night and the officer stating that he was (R. 370).

There was a dispute in the testimony as to whether Petitioner was questioned on Tuesday; Petitioner stating that he was (R. 294), and Sergeant Morales testifying that he was not (R. 392, 371). Petitioner stated that he had a roll and potato and a slice of bologna on that day (R. 143, 295). On Tuesday, his ex-wife visited Petitioner (R. 297), and was also visited by Mabel Webster (R. 297).

The jailer denied that Petitioner was taken out of his cell after midnight (R. 220). On Tuesday morning, Petitioner talked to a reporter (R. 399).

Wednesday, July 11, no claim was made by Petitioner that he was questioned during that day. There is a conflict in the testimony as to whether he was carried that day or the following day to Borger, where

his truck was searched by the officers. Suffice it to say, he was carried on one of the two days to Borger, where the officers, with his consent (R. 410), did search his truck. Again there was a dispute in the testimony as to whether Petitioner was visited by his brother-in-law while at Borger; Petitioner swearing that he was not and the officers stating that he was (R. 410). Petitioner testified that he was not questioned on this day (R. 120, 145, 297), and was fed during these days (R. 146). On Thursday, July 12, 1962, Petitioner talked to a lawyer in private (R. 374, 388). There is a dispute in the testimony as to whether Petitioner was taken to Borger by Sergeant Wood and Sergeant Morales. Morales denied having taken Petitioner to Borger on Thursday (R. 166, 297, 298). Petitioner stated that Sergeant Wood and Sergeant Morales took him to Borger that morning (R. 189, 297). Suffice it to say that he was carried to the Department of Public Safety at Midland where another polygraph examination was given him. Following this examination Petitioner gave a second written statement to Sergeant Morales in which he admitted killing his wife by strangling her with a belt. Petitioner testified that he was not abused on the way to Borger (R. 146). There was evidence that Petitioner was offered food when he was in Borger (R. 168). At Borger, Ranger Wood saw Petitioner around 11:45 with a cigar and a container of milk (R. 190, 300, 410, 414). Sergeant Morales did not question Petitioner in the morning and only after 3:00 p.m. on Thursday afternoon. The statement was given at 5:00 p.m. (R. 389, 390). Petitioner was driven back to the police station on that day by the Assistant Chief of Police Wayne Taylor. He told Taylor that he had not been mistreated by the officers (R. 396).

On Friday, July 13, Petitioner was delivered by the city officers to the sheriff and placed in the Midland County Jail.

The proof further showed that before Petitioner made and signed the third statement, which was the only confession introduced into evidence, he had consulted with an attorney (R. 155, 374, 388).

There is no claim that Petitioner was questioned by anyone from Friday until Tuesday, July 17, around 10:30 a.m. when he was questioned by Deputy Howell and District Attorney Joe Mims and, after being duly warned, made and signed the written confession introduced into evidence.

On Page 313 of the Record, Petitioner testified:

"Q. When you came to the county jail here in the courthouse, you came on Friday. Right?

"A. Yes, sir, I think so. I am not much sure, but I believe that's right.

"Q. And they treated you real nice.

"A. Yes, sir.

"Q. Nobody bothered you on Friday?

"A. No, sir, not as I remembers.

"Q. Saturday?

"A. No, sir.

"Q. Sunday?

"A. No, sir.

"Q. You remember those people coming up there Sunday to hold church services, don't you?

"A. Yes, sir.

"Q. Nobody mistreated you on Monday?

"A. No, sir.

"Q. And nobody mistreated you on Tuesday. That was the Tuesday while you were here at the county, I am talking about.

"A. No, sir.

"Q. All right, and you had plenty of food.

"A. Yes, sir.

"Q. While you were here at the county. Plenty of rest?

"A. Yes, sir.

"Q. None of these officers that you have been testifying about came here to the county to see you, did they, sir?

"A. They didn't come to see me."

On Page 148 of the Record we find:

"Q. No abuse, no threats, no nothing, Thursday night?

"A. Not after I got back to the city.

"Q. All right, sir, and then Friday they didn't ask you any questions down at the city.

"A. No, sir, not as I remember.

"Q. Thursday night you were left alone.

"A. Yes, sir.

"Q. At the city Thursday night.

"A. Yes, sir.

"Q. You weren't interrogated or bothered in any way Thursday night?

"A. No, sir, I don't think so.

"Q. You had a bed and toilet facilities and things of that nature, didn't you, sir?

"A. Yes, sir.

"Q. Friday. Did they question you any Friday at the city?

"A. No, sir, I don't believe they did. If they did I don't remember.

"Q. All that happened to you Friday was that they brought you over to the county jail. Is that correct, sir?

"A. Yes, sir.

"Q. No abuse, no threat, none of that sort of thing—

"A. No, sir.

"Q. —on Friday. They treated you all right on Friday.

"A. Yes, sir.

"Q. O.K. Do you know who brought you over here to the county?

"A. That Friday?

"Q. Friday, yes, sir.

"A. No, sir, I am not for sure. I know Sgt. Morales did for one and I don't know who else.

"Q. Mr. Clewis, we have been talking about Friday.

"A. Yes, sir.

"Q. And you were brought here to the county jail.

"A. Yes, sir.

"Q. Now, after you were put in the county jail, you never did see the Texas Ranger any more, did you, sir?

"A. No, sir, I don't believe I did.

"Q. And you didn't see Morales any more, did you, sir?

"A. I am not sure. Seems to me like I was down taking fingerprints or something one time and I saw Sgt. Morales. I am not sure about that.

"Q. You mean after you were over here at the county you saw Morales?

"A. Like I says, I says I'm not sure. I says I think I did, is what I says.

"Q. Did he ever ask you questions over here?

"A. No, sir.

"Q. If you saw him, he never had anything to do with you. Is that right?

"A. That's right.

"Q. But you are not sure you saw him.

"A. No, sir, I'm not sure.

"Q. All right, what about the polygraph operator. Did you use the polygraph operater after you came to the county?

"A. No, sir.

"Q. Well, did you see any of the city officers? You didn't see any of them after you came over here to the county jail, did you?

"A. No, sir, I don't think I did.

"Q. And, as a matter of fact, nobody, no officials, deputy sheriffs or anybody else, asked you any questions or talked to you on that Friday when you were brought over here, did they? They didn't ask you any questions, did they?

"A. No, sir.

"Q. Didn't threaten you in any way or anything like that.

"A. No, sir.

"Q. Didn't abuse you in any way, of course.

"A. No, sir.

"Q. And then Saturday nobody asked you any questions, did they?

"A. Well, no, sir, not as I know of.

"Q. Didn't abuse you or threaten you in any way here at the county. Nobody did that, did they?

"A. No, sir.

"Q. And then on Sunday nobody abused you or threatened you in any way, did they?

"A. No, sir.

"Q. I see. Then Monday nobody abused you or threatened you in any way.

"A. No, sir.

"Q. And nobody questioned you on Sunday nor Monday.

"A. No, sir, I believe not.

"Q. So, the first time after you came to the county, the first time that you talked to any peace officer, was when you talked to Mr. Gene Howell Tuesday morning. Is that right, sir?

"A. No, sir.

"Q. That's wrong?

"A. Well, I believe it was Mr. Fletcher. Some of them come up and got me and taken my fingerprints.

"Q. Oh, to take your fingerprints. They didn't talk to you about the case?

"A. No, sir.

"Q. They didn't abuse you in any way?

"A. No, sir.

"Q. They didn't hurt you or scare you in any way, did they?

"A. No, sir.

"Q. Just to take your fingerprints.

"A. Yes, sir.

"Q. All right, except to take your fingerprints, did anybody talk to you or question you or scare you or abuse you in any way here at the county?

"A. No, sir.

"Q. All right. And Tuesday morning, when you were talking to Mr. Howell,—you know Mr. Howell, the man who testified here today?

"A. Yes, sir.

"Q. When you were talking to Mr. Howell, he didn't abuse you in any way, did he, Mr. Clewis?

"A. No, sir, he didn't abuse me.

"Q. He didn't threaten you?

"A. No, sir.

"Q. And Mr. Fletcher didn't abuse you in any way, did he?

"A. No, sir.

"Q. He didn't threaten you in any way?

"A. No, sir.

"Q. And you certainly had no reason to be scared of Mr. Howell, did you, sir?

"A. Well, I don't know, sir.

"Q. Did he do anything to make you scared of him?

"A. No, sir, he never did nothing for me to be scared of him.

"Q. And did Mr. Fletcher do anything to make you scared of him?

"A. No, sir.

"Q. He treated you real nice in every way. Is that right—Mr. Fletcher and Mr. Howell?

"A. Yes, sir, they talked all right."

In his testimony, Petitioner stated that he was threatened and physically abused by Sergeant Morales, Ranger John Wood, and polygraph operator Reed. This was specifically denied by each of them. Petitioner also claimed that he was without food while in custody of the city police.

Testimony was presented by the State that Petitioner was offered food which, on occasions, he would refuse. On other occasions he was given milk and soup, for a stomach condition he claimed he had.

In a Supplemental Transcript, certain findings by the trial court which were reduced to writing were filed in the trial court and were forwarded to the Court of Criminal Appeals of the State of Texas. In those findings the trial judge certified that at the conclusion of the hearing, in the jury's absence, he found the confession offered in evidence as being voluntary and admissible. The evidence is undisputed that before Petitioner made the confession introduced into evidence, he had been taken before a magistrate, at which time charges were preferred against him and bail set. Further, Petitioner, while in custody, had been visited by relatives and friends and had consulted with an attorney. None of the officers who Petitioner claimed

had threatened and physically abused him when he made the first two confessions were present when he made the confession to Deputy Sheriff Howell.

The protective umbrella of *Escobedo v. Illinois*, 378 U.S. 478 (1964), has now been lifted by this Honorable Court in *Johnson v. New Jersey*, 384 U.S. ——, 86 S.Ct. 1772, by which decision it was determined that *Escobedo* was not to be applied retroactively, that is, to trials which commenced prior to June 22, 1964. Petitioner's trial was commenced on May 11, 1964, some six weeks prior to the decision of this Court in *Escobedo*. Likewise, the rule laid down by this Court in its decision in *Miranda v. Arizona*, 384 U.S. ——, 86 S.Ct. 1602, was applied prospectively in *Johnson v. New Jersey*, supra.

Thus, the only serious question presented here is whether the confession offered in evidence was illegally obtained and was the fruit-of-the-poisoned tree.

Of course, if the confession obtained is not the result or "fruit" of the illegal arrest or coercion or threats or abuses, or other "poisonous tree," such "fruit" thereof is not tainted and therefore is admissible. *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *United States v. Bayer*, 331 U.S. 532 (1947).

Furthermore, there are cases following the reasoning of *Lyon v. Oklahoma*, supra, which would indicate that even an involuntary confession will not necessarily prevent an after-acquired confession from being voluntary. It is clear in those cases and in the *Miranda* rule as qualified by *Westover v. United States*, 86 S.Ct. 1602 (1966), that if the surroundings are different and a more explicit warning is given with a more ex-

acting determination of the Petitioner's understanding thereof, the confession is admissible.

Deputy Sheriff Howell testified at Page 230 of the Record:

"Q. I ask you further, sir, if before Mr. Clewis gave you State's Exhibit 13 whether or not you first warned him that he did not have to make any statement at all.

"A. I did.

"Q. And that any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement is made.

"A. I did to that exact effect, yes, sir."

We find on Page 235 of the Record that:

"Q. Was a Texas Ranger present when he gave you State's Exhibit 13?

"A. No, sir.

"Q. Was there a detective from the police department present when he gave you State's Exhibit 13?

"A. There was not.

"Q. Was there a lie detector man present when he gave you State's Exhibit 13?

"A. There was not.

"Q. When the defendant told you that he had been abused, what did you say to him before you took this, then?

"A. I told him that regardless of what might have happened in the past and regardless of what he might want to say or do now, that no harm and no abuse of any form would come to him at all.

"Q. All right, sir. Did he make a request to you concerning a telephone call —

"A. Yes, sir.

"Q. —to see someone?

"A. Yes, sir, he said he would like to talk to someone.

"Q. What happened then?

"A. Well, I asked him who he wanted to talk to, his lawyer, his minister, or who, and he said he most of all would like to talk to his boss man.

"Q. All right, what happened?

"A. Well, he said his boss man was one of the partners in a construction firm in Odessa, and I placed a long distance call to that firm in an effort to contact that man for Mr. Clewis to talk to him, but he was not in the office; in fact, there was no answer at the office at that time.

"Q. Did you see any signs of abuse at all concerning the defendant when you were talking to him about State's Exhibit 13?

"A. Absolutely none.

"Q. Approximately how long did Mr. Mims talk to the defendant on this occasion?

"A. Oh, three to five minutes.

"Q. Then did Mr. Mims stay or did he leave?

"A. He left.

"Q. And whom did that leave then in your office there? Who was present then?

"A. Chief deputy Guy Fletcher and I, along with the defendant.

"Q. I beg your pardon?

"A. Along with the defendant.

"Q. Yes. Do you recall whether or not defendant had any coffee that morning?

"A. Yes, sir, he did have.

"Q. In your office there?

"A. Yes, sir.

"Q. Tell the jury whether or not you mistreated this defendant in any way.

"A. In no way whatever.

"Mr. Smith: We pass the witness."

And at page (R. 237):

"Q. Mr. Howell, concerning his stay in the county jail, tell the jury whether or not he was treated like any other prisoner while he was in the county jail.

"A. Absolutely.

"Q. Were you on duty on that weekend, Saturday and Sunday, before this Tuesday the confession was given, the statement was given?

"A. Yes, sir, that was my duty weekend.

"Q. Would you tell the jury whether or not, please, church people came to the jail on Sunday?

"A. Yes, sir, they did.

"Q. Did they hold services?

"A. Yes, sir.

"Q. Would you tell us, please, whether or not Marvin Clewis participated in the services in a group capacity.

"A. In a group capacity, yes, sir.

"Mr. Smith: We have no further questions."

In *Westover v. United States,* supra, at Page 1639, this Court stated:

> "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warning. *A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.*" (Emphasis Ours)

The salient features—incommunicado interrogation of an individual in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights that were present in *Escobedo,* supra; *Miranda,* supra; *Fikes v. Alabama,* 352 U.S. 191, 77 S.Ct. 281; *Culombe v. Connecticut,* 367 U.S. 568, 81 S.Ct. 1860; *Reck v. Pate,* 367 U.S. 433, 81 S.Ct. 1541, and *Davis v. North Carolina,* 86 S.Ct. 1761, *are not present in the instant case.* Here there was no incommunicado detention, Petitioner had been taken before a magistrate, he had consulted with an attorney, and had been warned that he need not give any statement whatsoever and that any statement that he would give would be used in evidence against him. The Petitioner has never suggested any impropriety in the interrogation by the Sheriff's Department which would require the exclusion of this statement.

In Goldsmith v. United States, 277 F.2d 335 (D.C. 1960), Appellant argued that he had been beaten and

terrified during interrogation, and that he re-affirmed the written statement after arraignment in fear of subsequent brutality. The Court held that even though oral and written confessions of defendants made before preliminary hearing may have been inadmissible for violation of the rule requiring preliminary hearing without unnecessary delay, under the circumstances the defendant's re-affirmation and enlargement of the formal written confession after preliminary hearing, including re-enactment of the crime, were not inadmissible as being the fruit of the original confessions. See also *United States v. Gorman,* 355 F.2d 151, cert.den. 86 S.Ct. 1962.

This Court, in *United States v. Bayer,* supra, said:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

The Court in *United States v. Hickey,* 247 F.Supp. 621 (1965), held at Page 624:

> "It is true that where a confession is secured by actual physical or psychological coercion, the intimidation or fear caused by this coercion may continue to lurk in the defendant's mind and destroy the validity of a later confession. Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954); Lyons v. Oklahoma, 322 U.S. 596, 64 S.Ct.

1208, 88 L.Ed. 1481 (1944). In such cases, the later confession may well become the "fruit of the poisonous tree." See Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920). However, the Courts have refused to extend this doctrine to cases wherein the defendant has confessed twice, once before and once after he has been advised of his rights. United States v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947); Goldsmith v. United States, 107 U.S.App. D.C. 305, 277 F.2d 335 (1960), cert. denied, 364 U.S. 863, 81 S.Ct. 106, 5 L.Ed.2d 86 (1960); Castle v. United States, 287 F.2d 657, 662 (5 Cir. 1961), reversed on other grounds, 368 U.S. 13, 82 S.Ct. 123, 7 L.Ed.2d 75 (1961). A confession is not rendered inadmissible solely because an earlier one was made without the defendant first being advised of his rights. The failure to inform him of his right to counsel is not irremediable; and once forewarned and cognizant of his rights, he has only his conscience with which he must contend."

Respondent is not familiar with any case in which this Court has ever held that an invalid confession ipso facto invalidates all subsequent confessions as a matter of law. It does not seem to us to be a denial of due process for the State to allow the jury to say, under all the facts and circumstances in evidence and under proper instruction by the court, whether the subsequent confessions were tainted or were free and voluntary. This is precisely what our Courts have done in the State of Texas. In *Lyons v. State of Oklahoma*, supra, it was said:

"The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of a sub-

sequent confession under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary."

We cannot say here that the subsequent confession as a matter of law was so completely under the influence of the first confession that to let a jury pass upon that influence as it affected the voluntariness of the later confession amounts to a denial of due process of law. To let the jury pass upon this question is not so unfair to Petitioner as to violate the fundamental principles of justice.

This Court, in *Wong Sun v. United States,* 83 S.Ct. 407 (1963), 371 U.S. 471, at Page 419, stated:

> "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341."

II.

Petitioner next asserts that his constitutional rights were violated in that he did not have an arraignment or preliminary hearing. There is no constitutional requirement that the states promptly present their prisoners for arraignment or preliminary hearing before a magistrate. In order to constitute a federal constitutional basis for vitiating a state conviction, it must be shown that a delay in taking an accused before a magistrate or the failure to conform to the state's requirements as to preliminary hearing or arraignment proceedings denied the accused due process of law in that it was in some way detrimental to his defense or

contributed to his conviction. *Gallegos v. Nebraska,* 342 U.S. 55, 65, 71 (1951); *Stein v. New York,* 346 U.S. 156, 187 (1953); *Lisenba v. California,* 314 U.S. 219, 235 (1941). Petitioner has produced no evidence in this case which would indicate that the State's alleged failure in any way resulted in prejudice to him at his trial. The mere technical infraction of a state procedural requirement would not of itself suffice to work a denial of due process.

The exclusionary principle applicable to criminal prosecutions in federal courts where the accused was not brought without unnecessary delay before a judicial officer, established by *McNabb v. United States,* 318 U.S. 332 (1943), has not been extended to state prosecutions as a requirement of the Fourteenth Amendment. *Culombe v. Connecticut,* supra.

III.

Petitioner complains of the trial court's overruling his pre-trial motion for discovery of certain documents and statements alleged to be in possession of the District Attorney. *Jencks v. United States,* 353 U. S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103.

By way of introduction, Respondent would point out that the Texas Court of Criminal Appeals in *Gaskin v. State,* 353 S.W.2d 467, has applied substantially the same rule to Texas prosecutions as has been applied to Federal by the so-called *Jencks* Act (18 U.S.C.A., § 3500). This rule applies where demand is made after the witness has testified on direct examination and under such rule the defendant is entitled to inspection of the statement for the purpose of cross-examination or impeachment, whether the statement has been used

by the witness before trial to refresh his memory or not.

We are cited no authority by Petitioner to support his premise that the Constitution requires the granting of his pre-trial motion for discovery. At the proper time when such officer had commenced his testimony on the voluntariness of the confession or confessions, Petitioner's counsel stated (R. 90):-

> "MR. LEGG: I am not asking for the confessions. I have told you that I don't even care to see them; I want to tell you that these confessions are inadmissible. The Court has got a right to look at them at any time he wants to and can in connection with this motion."

Accordingly, where Petitioner clearly indicated at the trial that he did not wish to see or use the prior confessions, it is difficult to see how he can complain here that they were not furnished to him in accordance with his pre-trial motion for discovery.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted,

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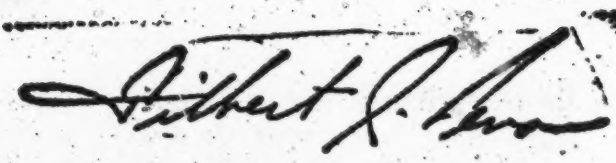

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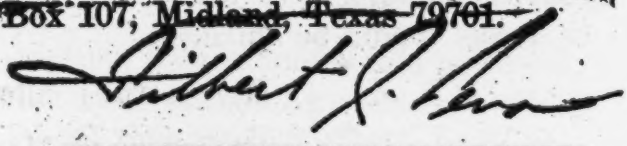
PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Reagan H. Legg, 1000 Midland Savings Building, P. O. Box 107, Midland, Texas 79701.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 648

MARVIN CLEWIS,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR THE PETITIONER

I.

The Facts in This Record Clearly Establish That Petitioner Was Denied Due Process of Law Under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States by the Admission Into Evidence of State's Exhibit No. 13.

Respondent in its brief, details at pages 35-41 the testimony of petitioner concerning his treatment in the Midland County jail, beginning on Friday, July 13, following his arrest by Sgt. Morales at 6:00 A.M. Sunday morning, July 8. As we pointed out in our original brief (Br. 24-25), petitioner did not claim that he was mistreated after he

was delivered into the custody of the sheriff. In detailing this testimony, the apparent purpose of respondent is to show that petitioner was not mistreated from Friday afternoon until Tuesday morning, when he was brought to the sheriff's office about 9:30 A.M. and began his written statement about 10:45 A.M. At this time, petitioner had already signed the first two statements which were procured by coercion.

Respondent's position seems to be that the effect of the coercive and abusive treatment of petitioner while he was in the hands of the city police and the Texas Rangers, was completely expurgated by the passage of three full days' time. The testimony of petitioner, as well as human experience, effectively rebut this proposition.

In our original brief, we called attention to petitioner's testimony demonstrating his state of mind on Tuesday morning (Br. 26, 45, 55, 86). Petitioner further testified (R. 307):

> "I was scared: I was scared they would do the same thing."

And, (R. 127):

> "Q. All right: Now, Marvin, why did you sign that third statement?
>
> "A. Well, I was afraid. I didn't think I could go through with the same thing I had went through for three or four more days, and I had already signed two statements, so I didn't figure it made any difference.
>
> "Q. Did they say something to you about taking another lie detector test?
>
> "A. Yes, sir, the officer that testified in here before I did, he asked me to take one.

"Q. Did you want to take another lie detector test?

"A. No, sir. I told him I wouldn't take nary another one.

• • • • •

"Q. Did you believe or didn't you that the same things would happen to you if you didn't sign another statement?

"A. Yes, sir, I believed the same thing would happen.

"Q. All right. Now, did Mr. Fletcher or Mr. Howell or anybody abuse you during that hour that you talked to them?

"A. No, sir.

"Q. All right. Did you have any reason to know whether they would or not unless you did sign a statement?

"A. Well, no, sir, I didn't have any reason, but those other officers, they told me things and they backed out on what they told me, so I didn't have any more belief about them than I did the others. They done something to me that they said they wouldn't do."

Portions of petitioner's testimony excerpted in our original brief are even more descriptive, but to reproduce them again would be repetitious. When all of these facts, and all of the aspects of petitioner's treatment at the hands of the police are gathered together, it is obvious that this petitioner could not have successfully resisted the pressures which began working anew as soon as he was brought into the sheriff's office on Tuesday morning, July 17. Petitioner did deny his guilt in the beginning, and asked to talk to someone. The "someone" he was allowed to talk to was the district attorney. As petitioner testified, when they brought the district attorney down, he could see the same pattern

of events begin taking shape once again (R. 153). He was afraid, and he knew that further resistance would be useless: They would eventually break him down, just as the other officers had done on the two previous occasions. He might as well go ahead and get it over with. As he said (R. 153):

> "I was scared and I didn't think I could take that no more, and so I just went on and gave them the statement, because I had already made two statements, and I didn't figure it made any difference. I had signed two."

Respondent, in its brief (Br. 36-41), quotes petitioner's testimony from pages 148-151 of the Record. Respondent does not carry that testimony forward, and five lines after his last quote, on page 152, this testimony appears:

> "Q. He didn't scare you in any way, did he?
>
> "A. Well, neither one of them, I would say, didn't scare me. *I was scared at the beginning.*" (Emphasis our own.)

This, in itself, demonstrates that the coercive influence of petitioner's early experience at the hands of the police still carried over and was still very dominant in his thinking on the morning the third confession was taken.

To accept respondent's view—that the influences which produced the first two confessions were no longer operating when the third confession was made, and that the "taint" had been dissipated—would be to invite new subterfuge on the part of law enforcement officers. Instructions in police manuals might well read: "Hit him, slap him, starve him, keep him up late at night, lock him up in a little room with

nothing but a chair and an ash tray, interrogate him relentlessly, take him to the grave, subject him to polygraph tests, transport him hundreds of miles in an automobile with officers, do not take him before a magistrate, do not explain his rights to him or procure counsel for him, until you have gotten a confession. Then, if the first confession doesn't suit you, do these things all over again until you get another confession from him. When you've gotten the confession you want, then turn him over to some other law enforcement agency in another jail, where he is fed, permitted to sleep, has visitors, and wait three days. Then let them bring him down, explain his rights to him in the most general terms possible, and start all over again. That makes it all right, because the coercion you had practiced on the suspect has been attenuated in law. The courts have said that a man cannot stay frightened after three days, even though he is kept in continuous custody and denies his guilt."

Mr. Justice Murphy, dissenting from the majority opinion in *Lyons* vs. *Oklahoma,* 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944):

> "Presumably, therefore, this decision means that state officers are free to force a confession from an individual by ruthless methods, knowing full well that they dare not use such a confession at the trial, and then, as a part of the same continuous transaction and before the effects of the coercion can fairly be said to have completely worn off, procure another confession without any immediate violence being inflicted."

Respondent's position here simply does not comport with human experience. Fear is not necessarily a fear of par-

ticular individuals. Marvin Clewis's fear was a fear of the awesome power of, and the brutality of, law enforcement officers, as evidenced by his treatment at the hands of officers who totally disregarded his rights and made a mockery of his dignity as an individual. "I didn't think I could take that no more" (R. 153).

As Chief Judge Tuttle observed in *Collins* vs. *Beto*, 348 F.2d 823, (5th Cir., 1965):

> "Nor can the mere passage of time serve to 'dissipate the taint' of an unlawful arrest. If this were so, the police would be free simply to keep a suspect 'on ice' for a day or two before beginning interrogation. This would postpone the tasting of the fruit but would not diminish its temptation."

Petitioner was not warned by Mr. Howell (the officer who reduced the third confession to writing, ten days after he was first arrested), prior to orally confessing. Deputy Howell's testimony reveals that the oral confession came first (R. 232-233):

> "Q. And did you and Mr. Fletcher talk to this defendant before you took that statement?
>
> "A. We did.
>
> "Q. Did he at first deny any guilt in connection with the death of his wife?
>
> • • • • •
>
> "A. He did.
>
> "Q. With which he had been by that time charged, had he not?
>
> "A. I believe so, yes, sir.
>
> "Q. Now did you talk to him for sometime after that?

"A. I did.

"Q. Did he still deny it?

"A. For a brief time, yes, sir.

"Q. Did he deny it until the time just prior to the time you began taking the statement?

"A. No, sir.

"Q. How long then would you say that denial continued?

"A. I would say it probably continued for a period of time. It wasn't said over a time or two, but it was during a period of some probably thirty or thirty-five minutes.

"Q. All right, I believe you said you first brought him down and started talking to him at 9:30 and started taking the statement around 10:30 or 10:45.

"A. Those are time approximately correct, yes, sir."

It is clear from Deputy Howell's testimony that the only warning given to petitioner was just prior to the time that the written statement was taken (R. 230):

"Q. I ask you further, sir, if before Mr. Clewis gave you State's Exhibit 13 whether or not you first warned him that he did not have to make any statement at all.

"A. I did.

"Q. And that any statement he may make may be used in evidence against him on his trial for the offense concerning which the statement is made?

"A. I did to that exact effect, yes, sir."

Failure to warn before the oral admission on Tuesday should bar the confession introduced in evidence. *Killough* vs. *United States,* 114 U.S. App. D.C. 305, 315 F.2d 241

(U.S. App. D.C., 1962); *Collins* vs. *Beto*, 348 F.2d 823 (5th Cir., 1965). The reaffirmation in writing of petitioner's oral statement cannot be considered independent of that statement. *Collins* vs. *Beto, supra.* Further, we submit that a warning by a law enforcement officer is not sufficient.

The same influences which caused Marvin Clewis to confess on the first two occasions were still operating on Tuesday morning when he was brought to the sheriff's office and the confession which was introduced in evidence was taken from him. The taint had not been dissipated—neither the taint of the coercive and abusive treatment which rendered his first two confessions involuntary, nor the taint of his unlawful arrest without a warrant by officer Morales. Everything that transpired was, in fact, the "fruit" of that first arrest. Petitioner's detention was at all times unlawful: he was still being detained as the result of a warrant which was issued on the ground of his first coerced confession, which in turn resulted from his illegal arrest by Morales.

Respondent cites *Goldsmith* vs. *United States,* 277 F.2d 335 (D.C. App., 1960) in support of its position here. That case, concerned primarily with interpretation of *Rule 5 (a), Federal Rules of Criminal Procedure,* was decided on the basis of the federal rules concerning arraignment, as set forth in *Mallory* vs. *United States,* 354 U.S. 449, 77 S.Ct. 1356. Counsel was appointed for the defendants and came and advised them of their rights. The judge also gave them a clear warning at the arraignment, but the statements were reaffirmed within an hour thereafter and the appellants also re-enacted the crime.

The Court said:

> "Appellants not only reaffirmed their formal written statements while they were lawfully detained, but did so in utterances which were plainly spontaneous and at a time when both the judicial warning and the advice of counsel as to their right to remain silent were not more than an hour old."

It can hardly be said that any statements made by Marvin Clewis were "spontaneous." They were in fact produced by coercion and relentless interrogation. The purpose of all interrogations conducted by the police and the deputy sheriffs was to secure a written confession. In his concurring opinion in *Killough* vs. *United States,* 315 F.2d 241 (U.S. App. D.C., 1962), Judge Wright analyzes the problem most succinctly. The following are excerpts from that opinion:

> "Admittedly, it is difficult to determine whether there is a connection between two confessions. But, human nature being what it is, we must recognize a presumption that one is the fruit of the other . . . There is then a rebuttable presumption that all subsequent confessions are tainted by the continuing influence of coercion."

And, at 315 F.2d 250:

> "The question remains whether the presumption of continuing coercion can survive the magistrate's hearing at which the accused is authoritatively advised, in the presence of his tormentors, that he may remain silent. I think it does. So saying, I do not belittle the commissioners' role or the importance of the statement required by *Rule 5 (b). But it must be remembered that*

the Rule contemplates a whole man, freshly arrested. For him, timely counsel as to his constitutional rights is a strong shield against police efforts to obtain a confession. The 'broken' man who has already yielded to coercion, is not so easily revived." (Emphasis our own.)

"So long as it can be said to be causally related to an admission secured during illegal detention, the subsequent confession is itself the 'fruit of the wrongdoing' and must be excluded."

And, again, at page 251:

"Certainly, lapse of time is an important factor . . . *But even a long interval between two confessions will not show them to be unconnected* unless the suspect was, in the meantime, enlarged, or at least left alone to regain his strength."

Judge Wright also points out how easy it would be for the police, on the second interrogation, to convince the suspect that his prior confession is, in fact, binding on him. That was the case here, when Marvin Clewis "figured it didn't make any difference." He had already signed two confessions beforehand.

The majority in *Killough* vs. *United States, supra,* deciding the case primarily on federal procedural grounds, said:

"To turn the law into a means of obtaining convictions by violating constitutional and statutory safeguards would in the end cause greater loss than gain, and would encourage deterioration in methods of detection."

And, Judge Wright said this:

> "The judiciary should not encourage illegal police practices by rewarding guilty officers with a successful prosecution."

This, petitioner submits, is a correct statement of the protection granted to our citizens under the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

In *Castle* vs. *United States,* 287 F.2d 657 (5th Cir., 1961), and *United States* vs. *Hickey,* 247 F.Supp. 621 (D.C. Penna., 1965), both relied upon by respondent in this case, there was no evidence of any kind indicating intimidation, coercion, duress, threats, or promises. In *Castle,* the appellant telephoned counsel at the beginning of the interrogation and a lawyer came and gave him advice. In *Hickey,* the statement in question was given within an hour after the defendant had been carefully warned of his constitutional rights.

United States vs. *Bayer,* 331 U.S. 532, 67 S.Ct. 1394 (19), also cited by respondent, is easily distinguished. In that case, a period of six months had elapsed between the two confessions in question.

The ultimate inquiry must be, of course, whether or not the confession was voluntary. That determination must always be made from the facts in each particular case. Petitioner submits that, contrary to respondent's assertion, admission of State's Exhibit No. 13 into evidence did "violate the fundamental principles of justice." If the taint was there, the confession should not have been admitted. We disagree with respondent's premise that the subsequent confession must be "completely under the influence of the

first confession." In this case, we submit that it was—but if that influence is present *at all,* the subsequent confession cannot be "the product of a rational intellect and a free will."

Had petitioner been released and been freed from the restraint of custody and its attendant coercive atmosphere, and then voluntarily returned and made another confession, then it might well be that the taint of the unlawful arrest and of the coercive treatment at the hands of the police would have been attenuated. Such was not the case, and petitioner was never freed from the coercive circumstances which compelled him to speak when his will was overborne.

Petitioner was held in continuous custody from the time of his illegal arrest without a warrant until the third confession was signed. Without the illegal arrest, there would not have been a first confession, a second confession, or a third confession. It was the exploitation of that arrest which resulted in the third confession as well as the first two. As Mr. Justice Brennan, writing for the Court in *Yong Sun* vs. *United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), said:

> "The more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be *purged* of the primary taint' Maguire, *Evidence of Guilt,* 221 (1959)." (Emphasis our own.)

When that test is applied to the facts of this case, it is quite clear that the primary taint of the illegal arrest had not been "purged."

In the second *Killough* case, *Killough* vs. *United States*, 336 F.2d 929 (D.C. App., 1964), Judge Wright has attempted to draw guidelines for determining when a subsequent statement is "fruit of the poisonous tree":

> "It seems to me that this court should clearly state that where a confession is illegally obtained in violation of *Rule 5 (a), F.R.Cr.P.*, subsequent confessions, however or by whom abstracted, are likewise inadmissible unless the government convincingly demonstrates the absence of connection with the prior illegal confession. In presenting this proof, the following considerations, among others, are most important: (1) Did the defendant have the advice of counsel subsequent to the illegally obtained confession? (2) What was the time interval between the confessions? (3) Was the defendant admitted to bail during that interval? While, as indicated, these considerations are not exclusive, they certainly provide the primary avenues of inquiry in determining whether the subsequent confession resulted from the illegally obtained one."

Those guidelines are based, of course, upon decisions of this Court. Judge Wright was concerned with a *per se* violation of *Rule 5 (a)*, when the person arrested made a statement before being taken before a magistrate.

In this case, there is no evidence that petitioner's rights were ever explained to him by the justice of the peace, and there is evidence that his illegal detention in the hands of the police continued thereafter. Even after the time petitioner was taken before a magistrate, the only possible legal basis for his detention was a warrant which issued after that hearing where a complaint was filed charging petitioner

with shooting Dorothy Mae Clewis with a gun, which was the substance of his first confession. That confession was coerced, the warrant which finally issued was false, and petitioner was still being illegally detained on Tuesday, July 17, when State's Exhibit No. 13 was signed by him. He did not have the advice of counsel subsequent to the illegally obtained confession; the time interval was only three full days, and he was never admitted to bail. In addition to petitioner's own testimony revealing his fear and the continuing effects of his coercive treatment, these facts alone should exclude any confession made by petitioner as fruit of his illegal arrest as well as fruit of the poisonous tree of coercive treatment at the hands of the police.

II.

Failure to Take Petitioner Before a Magistrate as Required by Texas Law Following His Arrest Without a Warrant, Was a Denial of Due Process and Did in Fact Contribute to His Conviction.

Respondent contends that the failure of the officers to take petitioner before a magistrate for a period of 38 hours did not in any way result in prejudice to him at his trial (Br. 50). Admitting that the behavior of the officers was a violation of state law, respondent evidently would pass this off as "harmless error." We have detailed in our brief at pages 68-71 the considerable harm that resulted to petitioner by the long delay in taking him before a magistrate. We have included this point as one of the circumstances which rendered petitioner's confessions involuntary and therefore inadmissible.

Although this Court has not extended the *McNabb-Mallory* rule to state criminal trials, failure to take an accused before a magistrate has often been considered as a part of the "totality of the circumstances." *Fikes* vs. *Alabama,* 352 U.S. 191, 197, 77 S.Ct. 281, 284, 1 L.Ed.2d 246 (1957); *Reck* vs. *Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Turner* vs. *Pennsylvania,* 338 U.S. 62, 69 S.Ct. 1352, 93 L.Ed. 1810 (1949); *Haynes* vs. *Washington,* 373 U.S. 502, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). Respondent, in its brief, raises the direct question whether or not that rule is applicable to the states, and asserts that the exclusionary principle should not be extended to the states.

Petitioner does not agree. We submit that such extension is not only not inappropriate, but is in fact a desirable corollary to the rules set forth by this Court in *Miranda* vs. *Arizona,* 384 U.S. ——, 86 S.Ct. 1602, 16 L.Ed.2d —— (1966). Apart from the safeguards prescribed in *Miranda,* the only "other fully effective means" of advising a defendant of his right to keep silent, of his right to an attorney, for an attorney to be appointed, and for him to be apprised of the consequences flowing from his answers to interrogation, is to take him immediately before the magistrate. Additionally, as now provided by *Rule 5 (c), F.R.Cr.P.,* the magistrate should be required to inquire into the charge and be certain that the defendant is being held on probable cause. As pointed out in our original brief, *Article 245, Vernon's Annotated Texas Code of Criminal Procedure* (1925) places the duty upon the magistrate to "proceed to examine into the truth of the accusation made."

It is evident from this record that petitioner would never have been tried or convicted, had he been taken before a magistrate immediately after his arrest, as Texas law re-

quires, and as is required by *Rule 5 (a), F.R.Cr.P.* The *McNabb-Mallory* rule has worked well in the federal courts. It should be made applicable to all state prosecutions.

III.

Failure of the Trial Court to Grant Petitioner's Motion to Require the State to Produce All Confessions of Petitioner Was a Denial of Due Process.

Respondent says that we have cited no authority in support of this point in our original brief, and urges the Court to find that petitioner waived any such right by the remark of his attorney (Br. 50-51).

Mr. Justice Fortas clearly stated the current trend toward disclosure in criminal cases analogous to the civil practice, in *Dennis* vs. *United States,* —— U.S. ——, 86 S.Ct. 1849, —— L.Ed.2d —— (1966). That opinion is referred to at page 89 of our brief. Contrary to respondent's view, petitioner insists that this language does support our premise that the Constitution requires that petitioner's motion for discovery be granted.

New *Rule 16 (a)* of the *Federal Rules of Criminal Procedure* definitely requires that a defendant be permitted to see and examine his own statements in possession of the prosecution. This right of discovery should be extended to state trials.

In our original brief, we did not call attention to the line of decisions in California under which the rule has evolved requiring the prosecution to make disclosure of any statements made by a defendant. In *People* vs. *Riser,* 47 Cal.2d 566, 305 P.2d 1, 13, 14 (1956), the history of discovery was

traced, and it was pointed out that at common law the accused in a criminal case "could not compel production of documents or other evidence in possession of the prosecution. Production was denied before trial on the ground that to compel prosecution to reveal its evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt, furthermore, that to allow the defendant to compel production when the prosecution could not in its turn compel production from the defendant because of the privilege against self-incrimination, would unduly shift to the defendant's side a balance of advantages already heavily weighted in his favor."

The California court went on to say:

> "The question, then, is not whether the defendant will be allowed advance disclosure of evidence upon which the prosecution plans to base its case, but whether he will be allowed any disclosure of evidence that the prosecution does not intend to produce in court at all.
>
> "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case . . . To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.
>
> "There must be more than a mere possibility that the statements when produced will contain contradictory matter and be in such form that they can be used to

impeach, but the chance that it may turn out eventually that they cannot be used for the purpose should not block production at the threshold. The precise problem, the relation between the admissibility and the right to production, was presented in *Gordon* vs. *United States, supra,* and the court there concluded that . . . 'production may sometimes be required though inspection may show that the document could properly be excluded.' "

In *Powell* vs. *Superior Court,* 48 Cal.2d 704, 312 P.2d 698, 700 (1957), the California court extended the rule announced in the *Riser* case by establishing the right of an accused to a pretrial production of the accused's own confession, admission, or statement:

"It nevertheless is a widely-recognized rule that application for pretrial inspection of a signed confession or admission of transcript of statements of an accused may be made by the latter and is addressed to the sound judicial discretion of the trial court, which has inherent power to order such inspection in the interest of justice."

In *People* vs. *Estrada,* 54 Cal.2d 713, 7 Cal. Reporter 897, 355 P.2d 641, 642 (1960), this language appears:

"The value of obtaining such a statement is that it may contain contradictions of the testimony of the witness, may omit some facts related by him at the trial, or may reveal a contrasting emphasis placed on the same facts. A defendant is not ordinarily in a position to show such matters until he has seen the statement."

While this case was concerned with the testimony of another witness, the same principle certainly applies to the defendant's own statements.

The next California case was that of *People* vs. *Garner*, 15 Cal. Reporter 623, 64 P.2d 452, 454 (1961), where the Court said:

> "Defendant's trial counsel was entitled to inspect, view, hear, or copy any and all statements of defendant's, and such was the order of the trial judge in discovery proceedings had before the trial."

In *People* vs. *Cooper*, 53 Cal.2d 755, 3 Cal. Reporter 148, 394 P.2d 964, 973 (1960), the California Supreme Court laid down the requirement that a defendant must show good cause for inspection, and that he must show more than a "mere desire for the benefit of all information which has been obtained by the people in the investigation of the crime."

These cases demonstrate the value of discovery, and the facts in the case before the Court readily demonstrate that prejudice.

Petitioner filed his Motion to Require State to Produce Confessions (R. 3-5) before any testimony was taken in this case, and it was overruled by the trial judge (R. 5). In that motion, petitioner showed good cause for inspection of the confessions, and asserted that such inspection was necessary if petitioner's defense was to be properly presented. Fairness required that the state produce these confessions and make them available to defendant. As summarized by Professor Murphy in his article "Criminal Discovery: What Progress Since U. S. vs. Aaron Burr?", *2 Criminal Law Bulletin No. 5*, page 14 (June, 1966):

"In the trial of a criminal case may we not start with the premise that truth is best revealed if ample authority is given to prepare in advance of trial? Is not criminal procedure designed to promote practices which will promote the quest for truth? And is the quest for truth best promoted by unequal adversaries under our adversary system? Or will the 'truth' be the 'truth' that *power* can impose? Power is on the side of the prosecution in a criminal case. Is it consonant with our constitutionally guaranteed concept of a fair trial to deny ample opportunity to the defense to prepare for trial? And does not that opportunity to prepare require a disclosure to the defendant of the evidence acquired by the imposition of unequal *power*?"

Respondent quotes a statement of counsel—made during the argument of another motion (petitioner's Motion to Exclude and Suppress Confessions) (R. 87-92)—and contends that this remark amounted to a waiver of any right to see or use the prior confessions. The trial court had already denied petitioner's Motion to Require State to Produce Confessions, and had stated to counsel that he would not require the state to produce them. The statement to which respondent refers was made after that action by the trial judge, and after evidence had been introduced in the main case.

Petitioner having already been denied the right to see, inspect, or use the statements, his counsel was at that point insisting that the prosecutor should produce the statements for examination by the court in connection with petitioner's Motion to Exclude and Suppress Confessions. That also was not done, although Mr. Justice Fortas in

Dennis vs. *United States,* —— U.S. ——, 86 S.Ct. 1840, —— L.Ed.2d —— (1966), effectively disposed of the contention that *in camera* inspection by the trial judge of grand jury minutes is a sufficient or satisfactory alternative. His opinion for the Court said:

> "While this practice may be useful in enabling the trial court to rule on a defense motion for production to it of grand jury testimony—and we do not disapprove it for that purpose—it by no means disposes of the matter . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

This is equally true of statements signed by a defendant.

Petitioner's counsel, having been denied the right to inspect the statements himself, was at this point alternatively urging that the trial judge should examine the statements in connection with petitioner's subsequent motion to exclude and suppress these confessions from the jury. In these circumstances, petitioner submits that there could have been no waiver of this right, and that denial of his Motion to Require State to Produce Confessions constituted a denial of due process.

While the decisions of this Court have been principally concerned with the interpretation of statutory procedural provisions governing the production of documents, rather than by the application of constitutional guarantees, past

decisions have also applied the common law. *Funk* vs. *United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369; *Gordon* vs. *United States*, 344 U.S. 414, 73 S.Ct. 369 (1953). In the latter case, the Court said:

> "In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the documents."

The basic principle of the *Jencks* decision is to assure the defendant a fair opportunity of making his defense. *Palermo* vs. *United States*, 360 U.S. 362, 365, 79 S.Ct. 1217, 1231 (concurring opinion of Mr. Justice Brennan). In the opinion just cited, Mr. Justice Brennan also notes the "serious question of potential invasion of Sixth Amendment Rights." Implicitly involved in the area of right to discovery is the right of any citizen to a fair trial. The Sixth Amendment also guarantees the accused the right of compulsory process to obtain witnesses for his defense, and Professor Wigmore has said that this right extends to the production of documents.[1]

Denial of access to petitioner's own statements in this case contravened the guaranties of due process and of compulsory process as extended to him by the Constitution. This, under no circumstances, can be considered "harmless error."

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[1] *8 Wigmore, Evidence*, Secs. 2191-93 (3rd ed. 1940). See also *United States* vs. *Burr*, 25 Fed. Cas. 30 (No. 14692d), CCVa. 1807).

CONCLUSION

Each confession secured from Marvin Clewis was obtained by means of coercion which rendered all such confessions involuntary. When the voluntariness rule and the totality of the circumstances criteria are applied to the facts of this case, the conclusion is inescapable that petitioner's will was overborne at the time he made the confession introduced in evidence at his trial. The same influences which "broke" him at first were still operating.

Petitioner's detention was, at all times, illegal. The confession introduced in evidence was the "fruit" of his illegal detention and of his unlawful arrest without a warrant. The confession introduced in evidence was "tainted" and, therefore, its admission when offered by the state was a deprivation of petitioner's constitutional rights.

Failure to take petitioner immediately before a magistrate, and the delay in taking him before a magistrate for a period of 38 hours, and then only after he had signed the first confession, was an important and significant coercive circumstance in determining the voluntariness of any confession made by him while in custody. The evidence shows that petitioner's rights were never fully or adequately explained to him, and that any explanation which might have been made by the magistrate when Clewis was finally taken before him, would have come much too late to be effective. Petitioner was already a "broken man." The *McNabb-Mallory* exclusionary rule should be extended to state trials.

Failure of the trial court to permit petitioner to examine and to use all statements extracted by the police from peti-

tioner, was a denial of due process. The right to disclosure now available in federal trials should be extended to state trials.

This conviction should be in all things reversed, and the use of any confession made prior to the trial and while petitioner was in continuous police custody, should be forbidden because such confessions were involuntary as a matter of law.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 648.—October Term, 1966.

Marvin Clewis, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[April 24, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

Petitioner Marvin Peterson Clewis stands convicted of the murder, by strangulation, of his wife, Dorothy Mae Clewis. The jury which found him guilty imposed a sentence of 25 years' imprisonment. During the course of his trial, petitioner moved to exclude from evidence three statements he had made while in police custody. Petitioner claimed that these statements had not been voluntarily made, and that their use against him at his trial would deny him due process of law, as guaranteed by the Fourteenth Amendment to the Constitution.[1] Evidence was taken by the court outside of the jury's presence, and the motion was overruled.[2] Petitioner's third, and last, written confession was then introduced in evidence over objection. The question of its voluntariness was presented to the jury, which, by its general verdict, resolved the question against petitioner. Petitioner's constitutional objection to the use of his statement was renewed in his motions for instructed verdict,

[1] Petitioner also claimed that his right to counsel had been violated in the securing of these confessions. Cf. *Massiah* v. *United States*, 377 U. S. 201 (1964).

[2] The trial judge did not make written findings on the voluntariness issue at the time of trial. Some eight months later he certified that he had concluded that the statement was in fact voluntary. This "belated entry and filing of the trial court's findings" was accepted as a supplement to the transcript of record by the Court of Civil Appeals.

and for a new trial, both of which the trial judge overruled. On appeal, the Court of Criminal Appeals of Texas affirmed the judgment of conviction. That court reviewed the record and concluded that it could not hold "that there are any undisputed facts which rendered the confession inadmissible as a matter of law." We disagree, and we reverse.

The question for determination is whether, considering the "totality of the circumstances," [3] Marvin Clewis' statements were not voluntary and should have been excluded. We approach this question from an independent examination of the whole record, our established practice in these cases.[4] Our recent observation in *Davis* v. *North Carolina*, 384 U. S. 737, 741 (1966), applies equally here: "As is almost invariably so in cases involving confessions obtained through unobserved police interrogation, there is a conflict in the testimony as to the events surrounding the interrogations." For the purpose of deciding this case, we need not go beyond the State's version of the facts. Accordingly, we do not consider petitioner's claim that he was subjected to physical assaults.

The trial of this case was prior to the date of decision of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the requirements of which, therefore, are not directly applicable, *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), although relevant on the issue of voluntariness, *Davis* v. *North Carolina*, 384 U. S. 737 (1966).

Petitioner was taken into custody at about 6 a. m. on Sunday, July 8, 1962, and first gave a statement to the police late in the afternoon of Monday, July 9. Thereafter, he was taken before a magistrate. On the view

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[3] *Fikes* v. *Alabama*, 352 U. S. 191, 197 (1957). See also, *e. g.*, *Davis* v. *North Carolina*, 384 U. S. 737 (1966); *Haynes* v. *Washington*, 373 U. S. 502 (1963).

[4] See *Davis* v. *North Carolina*, 384 U. S. 737, 741–742 (1966).

most favorable to the State, petitioner had been held some 38 hours before being taken before a magistrate to be charged, had had little sleep and very little food, and appeared to the police to be sick. He had been visited briefly once or twice, but had had no contact with a lawyer. He had consistently denied all knowledge of his wife's death until the point at which he agreed to give a statement, and then had confessed to killing her in a way (by shooting) that—it later devloped—was inconsistent with the facts.[5]

Petitioner next gave a statement on Thusday, June 12. The events leading up to the second "confession" may be summarized: having been formally charged, but unrepresented and unadvised by counsel, petitioner was interrogated fairly frequently and by several different officers from Monday evening to Thursday afternoon.[6] During this period he was driven on a round trip of about 600 miles, was administered several polygraph tests, was detained in at least three different police buildings, seems to have had very little to eat and little contact except with policemen. Despite all this, and in the face of his earlier "confession," he steadfastly denied any guilt—or even knowledge—with respect to his wife's death until he finally produced the second "confession."

On Friday, July 13, Clewis was delivered to the custody of the Midland County Sheriff. He remained in the county jail from then until Tuesday, July 17. During this time he was apparently not interrogated, abused, or denied adequate food and sleep. He did not, however, consult with a lawyer.

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[5] Most of the physical abuse petitioner later related allegedly occurred during this period.

[6] The State contends that Clewis did consult with an attorney on Thursday morning. He insists the conference took place on Friday morning. In any event, the State does not dispute his testimony that the only subject discussed with the lawyer was the matter of a fee, and that the lawyer declined to represent him.

At about 9:30 a. m., Tuesday, July 17, petitioner was again interrogated, this time by two deputy sheriffs. He again began by denying any guilt in connection with his wife's death. No lawyer was present, nor had petitioner been advised of his right to have one appointed. The Midland County District Attorney arrived, and shortly thereafter petitioner confessed for the third time. There is no testimony that any warning of the right to remain silent was given prior to this oral confession. About 10:45 a. m. preparation of a written statement was begun, following a formal warning of the right not to make it. Shortly thereafter, Clewis signed the statement which was introduced against him at trial.

On this record, we cannot hold that petitioner's third statement was voluntary. It plainly cannot, on these facts, be separated from the circumstances surrounding the two earlier "confessions." There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before. Compare *United States* v. *Bayer*, 331 U. S. 532, 540 (1947) with *Reck* v. *Pate*, 367 U. S. 433, 444 (1961).

Among the factors which require our conclusion that the "confession" was not voluntary are the following:

(1) During this long period of custody, petitioner was never fully advised that he could consult counsel and have counsel appointed if necessary, that he was entitled to remain silent, and that anything he said could be used as evidence against him. Cf. *Davis* v. *North Carolina*, 384 U. S. 737 (1966); *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Even after he was arraigned, he was not advised of his right to appointed counsel. Post-arraignment interrogation, over a period of more than a week, occurred

without the presence of counsel for the accused, and without any waiver thereof.

(2) The first statement was secured following an initial taking-into-custody which was concededly not supported by probable cause,[7] followed by 38 hours of intermittent interrogation—despite the Texas rule that an accused be taken before a magistrate "immediately." Texas Code Crim. Proc. (1925), Art. 217; now, substantially revised in other respects, Texas Code Crim. Proc. (1965), Arts. 14.06, 15.17. This was followed by prolonged, if intermittent, interrogation by numerous officers, in several buildings, punctuated by a trip to the grave site and a long trip to another town, and accompanied by several polygraph tests. The police testimony makes it clear that the interrogation was not intended merely to secure information, but was specifically designed to elicit a signed statement of "the truth"—and the police view of "the truth" was made clear to petitioner. The petitioner repudiated each of the first two confessions shortly after it was made, and denied the truth of the third one at his trial.

(3) The record inspires substantial concern as to the extent to which petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police. This factor takes on additional weight

[7] The arresting officer testified that he merely asked petitioner to accompany him to the police station. He was of the opinion that he had no probable cause to arrest petitioner. Plainly, however, petitioner must be considered to have been taken into custody either at the time the officer came to get him, or shortly thereafter when the police, by their conduct, effectively asserted a right to detain him indefinitely at the jail. The Court of Criminal Appeals was apparently of the view that the rule of *Wong Sun* v. *United States*, 371 U. S. 471 (1962), is inapplicable to state trials—an issue upon which we express no opinion herein, since we find petitioner's statement inadmissible on other grounds.

in that petitioner, a Negro, had only a fifth-grade education. He had apparently never been in trouble with the law before.

For the foregoing reasons, the judgment below must be, and is,[8]

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE HARLAN concur in the result.

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[8] At trial, petitioner moved for production by the State of all three confessions, as necessary to support his claim that the manner of their eliciting rendered them inadmissible. That these prior confessions might have been directly relevant to petitioner's central defense can scarcely be doubted; for example, it came out during the hearing on the motion to suppress that petitioner had initially confessed to killing his wife by shooting her—a claim contrary to his later confessions and to known facts later discovered—and this inconsistency lends some weight to petitioner's defense of nonvoluntariness. Perhaps there were other inconsistencies which petitioner could have shown, had he had access to the prior confessions. Under amended Rule 16 of the Federal Rules of Criminal Procedure, a federal defendant could, *prior to trial*, discover his own statements; it seems that under the new 1965 Texas Code of Criminal Procedure, Art. 39.14, pretrial discovery of petitioner's confessions would have been proper. Cf. also *Dennis* v. *United States*, 384 U. S. 855, 871, and n. 17 (1966). This Court has suggested that in some circumstances it may be a denial of due process for a defendant to be refused any discovery of his statements to the police. *Cicenia* v. *Lagay*, 357 U. S. 504, 510–511 (1958); *Leland* v. *Oregon*, 343 U. S. 790, 801–802 (1952). In light of our disposition of this case, however, we need not reach this question.